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ABSTRACT

Judicial decisions affecting educational policy and management that were handed down in 1992 by state and federal courts are summarized and analyzed in this book. The analyses are divided into nine topical chapters: (1) "Employees" (Ralph D. Mawdsley); (2) "Bargaining" (Charles J. Russo); (3) "Pupils" (Henry S. Lufler, Jr.); (4) "Individuals with Disabilities" (Allan G. Osborne, Jr.); (5) "Torts" (William J. Evans, Jr.); (6) "Sports" (Linda A. Sharp); (7) "Higher Education" (Robert M. Hendrickson); (8) "Education Related" (Mary Jane Rapport and Stephen B. Thomas); and (9) "Federal and State Legislation" (Dixie Snow Huefner). Appended are "Federal Regulations: Part B of the Individuals with Disabilities Education Act" and "34 CFR Part 300--Assistance to States for the Education of Children with Disabilities," followed by a table of cases and an index. (MLF)

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THE YEARBOOK
OF
EDUCATION LAW
1993

Edited by

STEPHEN B. THOMAS

KENT STATE UNIVERSITY

NATIONAL ORGANIZATION ON
LEGAL PROBLEMS OF EDUCATION
TOPEKA, KANSAS

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Introduction

As in past years, the number of cases involving pre-collegiate public sector employees continues to be about 200. Also, as in past years, this chapter of the *Yearbook* does not address cases that would be the subjects of other chapters of this *Yearbook*, namely higher education, tort liability, and collective bargaining. The overwhelming majority of the cases reported in this chapter focus on substantive law; procedural matters are generally either omitted or are deemphasized. No United States Supreme Court decision involving public elementary or secondary employees was handed down during the 1992 calendar year. However, past Supreme Court decisions are noted where they are relevant to current cases. As has consistently been the case over past years, the sections with the largest number of reported cases were dismissal, nonrenewal, demotion, and discipline, with many cases concerning school board compliance with district and state policies.

Discrimination in Employment

Claims involving discrimination can arise under state or federal law, but the overwhelming number of cases in this chapter have litigated rights under federal statutes. The most prominent statute continues to be title VII of the Civil Rights Act of 1964.[1] Title VII prohibits both public and private institutions from discriminating on the basis of race, color, religion, sex, and national origin. In addition, gender-based discrimination is prohibited by title IX of the Education Amendments of 1972[2] and gender-based wage discrimination is prohibited by the Equal Pay Act of 1963.[3] Discrimination against employees age forty or older is prohibited by the Age Discrimination in Employment Act of 1973 (ADEA)[4] and discrimination against "other qualified handicapped individuals" is prohibited under section 504 of the Rehabilitation Act of 1973.[5] The newest statute protecting those with disabilities is the

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[1] 42 U.S.C. § 2000 *et seq.*
[2] 20 U.S.C. § 1681 *et seq.*
[3] 29 U.S.C. § 206(d)(1).
[4] 42 U.S.C. § 1601 *et seq.*
[5] 20 U.S.C. § 794 *et seq.*

Americans With Disabilities Act of 1990[6] but, since the statute only became effective against public schools in 1992, no case law has yet developed. Discrimination based on national origin and race is prohibited by section 1981 of the Civil Rights Act of 1866.[7] Discrimination complaints can also be pursued under section 1983 of the Civil Rights Act of 1871 which protects constitutional and statutory rights.[8]

A number of cases arising under both state and federal anti-discrimination statutes indicate the wide range of fact situations that can be litigated. In a somewhat novel set of facts alleging gender discrimination under title VII, an unwed teacher who was pregnant by artificial insemination stated a triable cause of action as a result of the nonrenewal of her contract.[9] An employee who had voluntarily entered into a consensual retirement settlement which included the withdrawal of a harassment claim was precluded from alleging under section 1983 or ADEA that she had been constructively discharged. Accepting benefits under such an arrangement is inconsistent with a claim that she had been improperly induced into accepting the settlement.[10] In a case of some importance for employment practices in Illinois, a state appeals court ruled that a school district prohibiting intradistrict faculty transfers where one spouse would be supervising another fell within the state Human Rights Act's prohibition of discrimination based on marital status.[11] The court observed that the policy "imposes a direct burden upon marriage [because] [a] person who remains single would not be affected by the rule."[12] Finally, in a seldom litigated area of veterans' preference statutes, the Minnesota Court of Appeals determined that a veteran failed to state a violation of Minnesota's veteran preference statute.[13] In this case an honorably discharged, nondisabled veteran with experience as a school bus driver had five extra points awarded to his Civil Service Commission score for his veteran status. However, in hiring sixty-two drivers, one of whom was the plaintiff, the school district divided the drivers into three training groups, each group having a different training date. Because plaintiff was in the third group and his ranking on the bidding list was forty-fourth, plaintiff argued that the school district had effectively eliminated his veteran preference point advantage. In rejecting plaintiff's argument the court observed that "the plain language of the act addresses only the issue of a veteran's ranking on an eligibility list. Once that list has been compiled, the veteran preference laws contain no guarantee as to seniority."[14] A high school principal who had refused to recommend an applicant for a social studies position because of perceived homosexual tendencies was entitled to qualified immunity in a section 1983 action.[15] The court could find no "clearly established line of authority proscribing an adverse action against civilian job applicants based on homosexual or perceived homosexual orientation."[16]

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[6] 29 U.S.C. § 706; 42 U.S.C. § 12101 *et seq.*

[7] 42 U.S.C. § 1981.

[8] 42 U.S.C. § 1983.

[9] Cameron v. Board of Educ. of Hillsboro, Ohio, City Sch. Dist., 795 F. Supp. 228 (S.D. Ohio 1991).

[10] Welsing v. Government of Dist. of Columbia, 784 F. Supp. 917 (D.D.C. 1992).

[11] River Bend Community Unit Sch. Dist. No. 2 v. Human Rights Comm'n, 597 N.E.2d 842 (Ill. App. Ct. 1992).

[12] *Id.* at 846.

[13] Grehl v. Minneapolis Pub. Schs., 484 N.W.2d 815 (Minn. Ct. App. 1992).

Race

Cases in this section involved both individual complaints and school district policies. A black high school basketball coach who had been released from coaching duties after three years failed to establish a *prima facie* case of racial discrimination where, considering evidence of community dissatisfaction with his abilities and techniques, he was not able to show that he was performing his job satisfactorily.[17] In an Ohio case, a federal appeals court ruled that the Cincinnati public teacher transfer policy did not violate the equal protection clause.[18] In this case the school district policy provided that the percentage of black teachers in any school should not be 5% greater or less than the percentage of black teachers throughout the system. Both white and black teachers had been denied transfers pursuant to this policy, and the federal appeals court declared that "the attainment of an integrated teaching staff is a legitimate concern in achieving a school system free of racial discrimination."[19]

Religion

The only case in this section, which involved a claim by a high school biology teacher that state and school district curriculum guides requiring him to teach the evolutionist theory of origins and a directive from the school principal prohibiting him from making comments on his creationist views, was dismissed as not violative of the teacher's free speech rights. The court noted that the teacher's religious speech rights needed to be balanced against the students' rights to be free of religious influence or indoctrination in the classroom.[20]

Sex

Claimants both won and lost on gender discrimination claims. The decision by a superintendent to post a position of Director of Special Education both inside and outside the district, allegedly to increase the pool of applicants so that plaintiff-female would not be selected, could not be imputed to the school board who made the hiring decision where the board was unaware the superintendent did not want plaintiff to fill the position.[21] Plaintiff, an employee of the school district, was one of the finalists but the board selected a male from outside the district who was clearly more qualified. In reversing a district court judgment on behalf of the plaintiff, the court of appeals found that gender was not a factor in the school board's decision and under the precedent of *Price Waterhouse v. Hopkins*[22] "we are to look at the motive of the decision maker at the time the decision is made."[23] In a case of some importance, the Second Circuit Court of Appeals held that a job classification system based on a state civil service classification was not necessarily a defense under the Equal Pay Act.[24] In this case, a female classified as a "cleaner" who alleged she was performing the same work as higher paid males classified as "custodians" stated a *prima facie* case under the Equal Pay Act. The "factor other than sex" exception to the Equal Pay Act was held to apply only when the employer proves that the job classification system resulting in differential pay is "rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue."[25] Refusal of a school district to appoint a female high school teacher to coach the boys' tennis team because of past excessive absenteeism was not a pretext for sex discrimination where the record indicated that during the same year a male had been denied a coaching position because of excessive absenteeism.[26] In interpreting the Civil Rights Act of 1991 in the context of a sex discrimination case, a federal district court decided that jury trial and compensatory damage provisions were not to be applied retroactively.[27]

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[14] *Id.* at 817.

[15] Jantz v. Muci, 976 F.2d 623 (10th Cir. 1992).

[16] *Id.* at 629.

[17] Parham v. Macomb Unit Sch. Dist. No. 185, 596 N.E.2d 1192 (Ill. App. Ct. 1992).

[18] Jacobson v. Cincinnati Bd. of Educ., 961 F.2d 100 (6th Cir 1992).

[19] *Id.* at 102.

[20] Peloza v. Capistrano Unified Sch. Dist., 782 F. Supp. 1412 (C.D. Cal. 1992).

Age

Two cases involved fringe benefits. In one case, plaintiffs alleging that an early retirement incentive plan discriminated on the basis of age were required to show that the plan discriminated in a nonfringe aspect of the employment relationship under ADEA.[28] On the other hand, a California State Retirement System (STRS) provision that prohibited teachers over age sixty from eligibility for a disability allowance was found to violate ADEA because plaintiff teacher was forced to retire when she was declared ineligible for disability and would have no other source of income.[29] While the terms of *bona fide* employee benefit plans are generally excluded from ADEA, the Act provides specifically that "no...employee benefit plan shall require or permit the involuntary retirement of any individual...because of the age of such individual."[30] In a case of first impression, a federal district court in New York determined that the ADEA did not apply to religious schools.[31] Expanding upon *N.L.R.B. v. Catholic Bishop*,[32] the court determined that constitutional questions would be raised by religious schools defending "ADEA law suits brought by lay instructors charged with nonsecular duties."[33] In addition, the court observed that no language in ADEA indicated that it was intended to apply to church affiliated institutions.

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[21] Cesaro v. Lakeville Community Sch. Dist., 953 F.2d 252 (6th Cir. 1992).

[22] 490 U.S. 228 (1989).

[23] Cesaro v. Lakeville Community Sch. Dist., 953 F.2d 252, 254-55 (6th Cir. 1992).

[24] Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520 (2d Cir. 1992).

[25] *Id.* at 525.

[26] New Paltz Cent. Sch. Dist. v. State Div. of Human Rights, 577 N.Y.S.2d 510 (App. Div. 1991).

[27] Boss v. Board of Educ., Union Free Sch. Dist. # 6, 798 F. Supp. 116 (E.D.N.Y. 1992).

[28] Cipriano v. Board of Educ. of City Sch. Dist. of City of North Tonawanda, N.Y., 968 F.2d 1502 (2d Cir. 1992).

National Origin

Both cases in this section involved Puerto Ricans, one in Puerto Rico and the other in New York. State department of education officials in Puerto Rico were entitled to qualified immunity as a result of discharging a citizen of Columbia pursuant to a statutory provision that all teachers had to be citizens of the United States or Puerto Rico. The court's rationale in this case was that the established law in September 1986 (i.e., the time when this discharge occurred) was not settled concerning the employment rights of aliens.[34] In New York, a Puerto Rican probationary Spanish language teacher failed in his complaint of national origin discrimination when his teaching contract was not renewed. In dismissing plaintiff's complaint against the New York City Board of Education, the New York State Commission, and the Commonwealth of Puerto Rico, the court found no credence to the claim that the school district's support of English as a Second Language and failure to offer Spanish as a Second Language supported plaintiff's national origin discrimination claim.[35]

Disability

Plaintiffs were both successful and unsuccessful in making disability claims. In an important federal case in Nebraska, a federal district court judge upheld the Federal Highway Administration's prohibition against all insulin-using diabetics from driving commercial motor vehicles in interstate commerce.[36] In this case, transfer of diabetic drivers to positions as school bus aides was upheld. Employee claims that reasonable accommodation could be made by the school district permitting them to carry certain foods on the bus were rejected "for the reason that the job of a school van driver cannot reasonably be altered to eliminate the actual, substantial risk that a mild or severe hypoglycemia reaction poses to either a driver or the school children who would be van passengers."[37] A New Hampshire school board improperly discharged a tenured teacher due to an average twenty-two days missed because of chronic asthma during the six years preceding his discharge. Because teacher's condition qualified as a handicap under the state handicap statute, plus expert testimony that the teacher's condition should be greatly improved, the school board was prohibited from evaluating the teacher's performance based on absences occurring during previous years.[38] In a procedural case, a teacher who had failed to give notice of her section 1983 claim for handicap discrimination was precluded from amending her original section 1983 claim stating race discrimination after the school district had been awarded summary judgment on the original section 1983 action.[39]

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[29] Smith v. Alum Rock Union Elementary Sch. Dist., 8 Cal. Rptr.2d 399 (Ct. App. 1992).
[30] 29 U.S.C. § 623(a).
[31] DeMarco v. Holy Cross High Sch., 797 F. Supp. 1142 (E.D.N.Y. 1992).
[32] 440 U.S. 490 (1979).
[33] DeMarco v. Holy Cross High Sch., 797 F. Supp. 1142, 1152 (E.D.N.Y. 1992).
[34] Quintero de Quintero v. Aponte—Roque, 974 F.2d 226 (1st Cir. 1992).
[35] Castro v. New York City Bd. of Educ., 787 F. Supp. 26 (D. Puerto Rico 1992).

Substantive Constitutional Rights

The constitutional rights that are the subject of this section include the First Amendment rights of freedom of speech, freedom of association, right of privacy, and the right of those with liberty and property interests not to be treated by government in an arbitrary or capricious fashion, such as the right to substantive due process under the Fourteenth Amendment where the state government is concerned, or under the Fifth Amendment where the federal government is concerned. As in past years, this section is dominated by free speech cases. Whether the constitutional rights are clearly established can become an issue if defendants seek to escape liability through governmental immunity. In just such a case, a federal court of appeals has determined that the Director of the Arkansas State Board of Private Career Education could be liable for furnishing false information to a judge which led to a warrant being issued for the plaintiff's arrest. An Arkansas statute indemnifying the state for actual damages assessed against state officials was not a clear and unequivocal waiver of the state's Eleventh Amendment immunity and therefore the Director could not be liable in her official capacity.[40]

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36. Wood v. School Dist. of Omaha, 784 F. Supp. 1441 (D. Neb. 1992).
37. *Id.* at 1452.
38. *In re* Dunlap, 604 A.2d 945 (N.H. 1992).
39. Allen v. Bergman, 412 S.W.2d 549 (Ga. Ct. App. 1991).
40. Burk v. Beene, 948 F.2d 489 (8th Cir. 1991).

Speech

School employees were generally unsuccessful in their free speech claims against school districts. Several cases found that the speech did not address matters of public concern. A high school teacher whose supplemental contract for coaching basketball was not renewed lost in his claim that the nonrenewal was based on a negative comment about the school board attributed to him in the local paper. The coach's quoted remarks in the paper were not considered to be a matter of public concern because they were directed at the team's poor performance and at the trial the coach testified that he was happy in the school district.[41] A school district employee who was dismissed from her coaching duties following the appearance of a paragraph in the Faculty Association's newsletter focusing on low employee morale and the stress placed on faculty, lost in her claim that she had been retaliated against for her exercise of free speech. In finding for the school district, the court observed that the teacher's remarks did not relate to a matter of public concern and did not comment on any broad social or policy issue.[42] School cafeteria employees who were discharged after refusing to serve food for no pay at monthly school board meetings held during nonwork-day hours had causes of action under FLSA for lost wages and under the Texas Whistle Blower Act for punitive and mental anguish damages. However, the employees did not have a free speech cause of action because complaints to the superintendent about having to prepare and serve food without compensation were not matters of public concern.[43] In Colorado, a two-day suspension with pay for an assistant principal was upheld over a claim that his free speech rights had been violated. In upholding the discipline, a Colorado appeals court noted that plaintiff's negative comments regarding the lack of qualification of the person selected as principal were not a matter of public concern, but the comment concerning reverse discrimination in the selection was of public concern. However, since the discrimination was tangential to plaintiff's personal concern over the administration of the school, the school district's interest in the efficient and effective operation of its system must prevail and, therefore, plaintiff had no constitutional protection.[44] A jury award for section 1983 compensatory and punitive damages against an assistant superintendent for terminating a bus driver's contract following his public opposition to proposed tax levies was reversed on appeal. The assistant superintendent's reasons for termination were identified as numerous complaints about the use of profanity and violation of a state safety standard prohibiting children from standing while the bus was in motion. In addition, other bus drivers who had spoken out against the tax levy had not been discharged.[45]

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[41] Adkins v. Stow City Sch. Dist. Bd. of Educ., 591 N.E.2d 795 (Ohio Ct. App. 1990).

[42] Sanguigni v. Pittsburgh Bd. of Pub. Educ., 968 F.2d 393 (3d Cir. 1992).

[43] Knowlton v. Greenwood Indep. Sch. Dist., 957 F.2d 1172 (5th Cir. 1992).

[44] Gabel v. Jefferson County Sch. Dist. R-1, 824 P.2d 26 (Colo. Ct. App. 1991).

Employees also lost in mixed motive cases. A discharged teacher's criticism of the superintendent was not the cause of his dismissal and, even if the criticism had been a factor in the discharge, the motivating factor was the teacher's well-publicized alcoholism. In addition, the teacher had failed to assert any link between his speech and his discharge during the administrative hearing on his termination.[46] A probationary teacher's requests to the school principal and superintendent to properly store and remove dangerous chemicals in the school was protected speech, but the teacher's nonrenewal was upheld when a jury determined in an interrogatory that the school district would have removed the teacher regardless of her free speech. In this case, the jury also returned a damages award of $75,000 against the principal, but because the interrogatory was inconsistent with the damages award, judgment was entered for the principal.[47]

A former school principal lost in his section 1983 action against a teacher's union and its local managing agent to recover for lobbying against him during an election, including a charge that he was a racist.[48] In reversing a $1,000,000 judgment against the defendants, the Sixth Circuit of Appeals observed that "a citizen's right to speak freely is not limited to fair comment."[49]

An employee also lost because she selected an improper remedy. A teacher in Ohio, who sought to sue her employer under the section of the Ohio Constitution protecting free speech, alleging that she had been discriminated against because she had spoken out against board activities, lost in her lawsuit. The Ohio Constitution did not provide a private remedy for plaintiff's alleged wrong and plaintiff had other adequate remedies.[50] In holding that plaintiff did not have a private cause of action against her employer, the court deferred "to the legislative process of weighing conflicting policy considerations and creating certain administrative bodies and processes for providing remedies for public employees such as [plaintiff]."[51]

Employees were successful in only two free speech cases. The free speech rights of both a nontenured and a tenured teacher were violated following production of a videotape at school with school equipment during nonschool hours, but with the principal's permission. The reason for disciplining the teachers, because of some profanity and partial nudity in the videotapes, violated the teachers' constitutionally protected right of artistic expression.[52] A Kentucky statute prohibiting school employees from participating in political "activities" in campaigns for election of school board members was held to be unconstitutionally vague and over broad.[53] While the government has the right to prohibit state employees from active participation in politics, this statute prohibiting "activities" was unconstitutionally vague because "men of common intelligence must necessarily guess at its meaning."[54]

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[45] Cox v. Miller County R-1 Sch. Dist., 951 F.2d 927 (8th Cir. 1991).

[46] Vukadinovich v. Board of Sch. Trustees of Mich. City Area Schs., 776 F. Supp. 1325 (N.D. Ill. 1991).

[47] Ingrum v. Nixa Reorganized Sch. Dist. R-2, 966 F.2d 1232 (8th Cir. 1992).

[48] Eaton v. Newport Bd. of Educ., 975 F.2d 292 (6th Cir. 1992).

[49] *Id.* at 298.

[50] Provens v. Stark County Bd. of Mental Retardation and Developmental Disabilities, 594 N.E.2d 959 (Ohio 1992).

[51] *Id.* at 965.

Association

Only two cases were reported in this section. The first case concerns an ongoing conflict between the two major political parties in Puerto Rico. Government officials in Puerto Rico were shielded from section 1983 liability for transferring plaintiff from a tenured position to an administrative position with a lower salary, ostensibly because of plaintiff's support of an opposing political party. The federal appeals court determined that immunity was appropriate because no clearly established constitutional right to protection from politically motivated patronage demotions or transfers existed in 1986 when the transfer occurred. In 1990, the United States Supreme Court in *Rutan v. Republican Party of Illinois*[55] had explicitly extended constitutional protection to promotion, demotion, transfer, recall, and hiring decisions.[56] In the second case, the political association and free speech rights of a superintendent were not violated where he had aligned himself with incumbent board members favorable to his operation of the schools and had opposed election of school board members who favored greater involvement of the school board in school district operations.[57] When the new members won election by a wide margin, the superintendent was terminated. In balancing the school board's governance power with the superintendent's rights of political association with incumbent board members and free speech, the court ruled in favor of the board because a close working relationship between the superintendent and the school board was essential. Additionally, the court held that by openly opposing the new majority during the election, the superintendent had "stepped over the line."[58]

Religion

The cases in this section involved establishment challenges to exemptions for religious organizations. The New York Court of Appeals has upheld the state's exemption under the unemployment compensation statute for employees of religious organizations. In this case, a teacher terminated at a Jewish school was required to pay back $4,140 in unemployment compensation benefits received. In response to the teacher's establishment clause claim that the exemption advanced religious over nonreligious organizations, the court observed that the exemption for religious organizations had been continued while the exemption for other nonprofit organizations had been abolished because employment in religious organizations was seen as stable. This reason was sufficient to state a secular purpose and defeat the establishment clause challenge.[59] The terms of a will establishing Kamehameha schools in Hawaii and requiring all teachers to be Protestant was determined to qualify as a title VII *bona fide* occupational qualification (BFOQ) exemption. Establishing a Protestant atmosphere for learning came within the title VII exemption for the school with a curriculum directed toward "propagation" of a religion.[60]

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[52] Rothschild v. Board of Educ. of City of Buffalo, 778 F. Supp. 642 (W.D.N.Y. 1991).

[53] State Bd. for Elementary and Secondary Educ. v. Howard, 834 S.W.2d 657 (Ky. 1992).

[54] *Id.* at 662.

[55] 110 S. Ct. 2729 (1990).

[56] Castro-Aponte v. Ligia-Rubero, 953 F.2d 1429 (1st Cir. 1992).

[57] Kinsey v. Salado Indep. Sch. Dist., 950 F.2d 988 (5th Cir 1992).

[58] *Id.* at 996.

Privacy

The cases in this section involved unsuccessful challenges by teachers to state standards affecting teachers. Suspension of a teaching certificate by the state board of education as a result of a teacher's commission of a burglary did not violate the teacher's constitutional right of privacy.[61] "There is no right of privacy involved in the commission of a burglary, at least as far as the felon is concerned."[62] A tenured teacher's attack on the constitutionality of a New York statute authorizing a school district to require a teacher returning from a medical leave to undergo a medical examination was not an invasion of privacy and sanctions were imposed against the teacher's attorney.[63]

Substantive Due Process

The cases in this section addressed the reasonableness of a state statute and a school district policy. A Massachusetts certification statute requiring that a person must have a certificate to be eligible for employment by a school committee did not give rise to a constitutionally protected property interest to challenge the committee's promotion of noncertified applicants in violation of state law. Plaintiff's allegation that various school officials had favored friends and cronies over certified applicants failed to link uncertified applicants to defendants or to establish that defendants acted with malicious intent or bad faith to injure the class of "noncronies" of the officials.[64] A school district's conflict of interest policy which prohibited school board members from teaching in the district, but permitted spouses of board members to teach, did not violate federal or state equal protection clauses and furthered a legitimate governmental interest in avoiding conflicts where a board member was a teacher.[65]

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[59] *In re* Klein, 578 N.Y.S.2d 498 (Ct. App. 1991).

[60] EEOC v. Kamehameha Schs./Bishop Estate, 780 F. Supp. 1317 (Haw. 1991).

[61] Hainline v. Bond, 824 P.2d 959 (Kan. 1992).

[62] *Id.* at 965.

[63] Strong v. Board of Educ. of Uniondale Union Free Sch. Dist., 789 F. Supp. 99 (E.D.N.Y. 1991).

Procedural Due Process

Except in the case of emergency suspensions with pay, the Constitution requires that employees who have "liberty" or "property" interests must be afforded procedural due process before adverse employment actions affecting those interests are implemented.[66] Although the type of due process provided will vary with the nature and severity of the anticipated consequences, the essence of due process is notice and a fair opportunity to respond to the charges.

Before it is determined that due process is required, it must be demonstrated that the employee had a legitimate claim of entitlement to a particular job. An employee at will has no legitimate claim of entitlement to a position, and neither does an employee who is simply rehired at the end of a term contract. An additional basis upon which to assert a claim to procedural due process arises when what the government is doing to an employee threatens to damage his reputation, honor, integrity, or standing in the community, particularly if it may foreclose future employment opportunities.

Liberty and Property Interests

Employees at will do not have property rights entitling them to procedural rights when their employment is terminated. A custodian who was an at-will employee under a Montana statute did not have a property interest entitling him to a pretermination hearing.[67] A school district policy which entitled an employee recommended for termination to notification of charges, statement of grounds for dismissal, and right to a hearing did not alter a custodian's employment policy at-will status under Wisconsin law. This single personnel policy standing alone, absent evidence that the employee and the school district agreed to be bound by the terms of the policy, did not give rise to a contractual right of entitlement.[68] A probationary Spanish language teacher who had acquired only one and one-half of three years teaching credit needed for tenure did not have a protectable property right under state law and, therefore, since he was essentially an employee at will, he could be terminated at any time without a due process hearing.[69]

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[64] Coyne v. City of Somerville, 972 F.2d 440 (1st Cir. 1992).

[65] Montrose County Sch. Dist. RE-1J v. Lambert, 826 P.2d 349 (Colo. 1992).

[66] *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).

[67] Medicine Horse v. Trustees, Big Horn County Sch. Dist. No. 27, 823 P.2d 230 (Mont. 1991).

[68] Vorwald v. School Dist. of River Falls, 482 N.W.2d 93 (Wis. 1992).

Employees with term contracts were likewise not successful in prevailing based on claims of property interests. A consultant contract between a school board and a former teacher permitting termination of the contract with a one-year notice did not create a legitimate claim of entitlement for contract renewal entitling the consultant to a statement of reasons and a hearing.[70] A nontenured teacher with a one-year contract had an expectancy of one year of employment entitling him to procedural due process. However, the teacher could be dismissed even though he had not been indicted or convicted for possession of cocaine, because an investigator's testimony indicated that he had observed the teacher drop a bag, later confirmed to contain cocaine.[71] Nonrenewed secretaries whose annual employment contracts had been renewed for six successive years did not allege evidence of an entitlement to future contracts so as to create property rights.[72]

Employees were not successful in alleging property rights based on contracts. A collective bargaining agreement which provided that a terminated employee could request a private hearing before the school district superintendent with a representative of his choice did not confer a right to continued employment because it did not alter the school district's "right to terminate employees pursuant to a proper exercise of its discretion."[73] A statement in an employee handbook that a "staff employee's employment [may] be terminated for proper cause" did not confer an enforceable contract right to continued employment so as to constitute a property right.[74]

Employees had mixed results claiming property rights under state statutes. A New York statute which provided that a tenured administrator "shall hold [his] position during good behavior and efficient and competent service, and shall not be removed except for [certain causes], after a hearing," conferred a property interest entitling an administrator to a pretermination hearing under *Cleveland Board of Education v. Loudermill.*[75] In addition, shifting the administrator's responsibilities to another position during a financial cut back also violated his due process rights when he was not given an opportunity to compete for that position.[76] On the other hand, nontenured teachers in Louisiana have no

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69. Castro v. New York City Bd. of Educ., 777 F. Supp. 1113 (S.D.N.Y. 1990).
70. Short v. School Admin. Unit No. 16, 612 A.2d 364 (N.H. 1992).
71. Stovall v. Huntsville City Bd. of Educ., 602 So. 2d 407 (Ala. Civ. App. 1992).
72. Brown v. Independent Sch. Dist. No. I-06 of McCurtain County, Okla., 974 F.2d 1237 (10th Cir. 1992).
73. Robbins v. Malone Cent. Sch. Dist., 581 N.Y.S.2d 493, 494 (App. Div. 1992).
74. Hohmeier v. Leyden Community High Schs. Dist. 212, 954 F.2d 461 (7th Cir. 1992).
75. 470 U.S. 532 (1985).
76. Goldberg v. Board of Educ. of Hempstead Sch. Dist., 777 F. Supp. 1109 (E.D.N.Y. 1991).

property interest in their employment entitling them to procedural due process. A state statute requiring each school board to adopt dismissal procedures for nontenured "school employees" did not apply to teachers because the legislature had dealt elsewhere with tenured and nontenured teachers.[77] In a case of importance in Texas, a state appeals court determined that the Term Contract Nonrenewal Act, which specifies procedural safeguards for teachers not being renewed, did not vest a teacher in "a vested property interest in continued employment . . . sufficient to give rise to constitutional claims."[78] In this case, a nonrenewed teacher was not entitled to a termination hearing because "a property interest cannot be defined by the procedures provided for its deprivation."[79]

As a final area, employees can voluntarily divest themselves of a property interest. A tenured librarian who had accepted early retirement could not claim loss of a property right when she was not later reinstated because she had voluntarily divested herself of her property interest.[80]

Only one case involving a liberty interest was reported. Reasons stated by a school district in a letter to elementary school parents for planning a suspension and reassignment of the school principal were sufficient to invoke a liberty interest requiring a hearing prior to her reassignment and eventual termination. Some of the comments considered to have raised a liberty interest were: the safety and security of children and staff were a top priority; a school meeting called by the principal jeopardized the safety of students and staff members; and the principal's judgment in failure to control the situation resulted in her suspension.[81]

Notice

Although notice generally applies to that received by the person subject to school district discipline, notice can also refer to that received by school districts. A teacher's appeal from a hearing officer's decision that sufficient cause existed to discharge the teacher was found by a court to have substantially complied with a Washington statute. Even though the statute required service of notice of appeal on the chairman of the school board, the teacher had sufficiently complied with the requirement by delivering notice to the chairman's secretary, who had furthered the notice to the office of general counsel pursuant to standard operating procedure.[82]

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[77] Wilhelm v. Vermilion Parish Sch. Bd., 598 So. 2d 699 (La. Ct. App. 1992).

[78] Grounds v. Tolar Indep. Sch. Dist., 827 S.W.2d 10 (Tex. Ct. App. 1992).

[79] *Id.* at 12, (quoting from Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985)).

[80] Wefel v. Rockwood R-6 Sch. Dist., 779 F. Supp. 468 (E.D. Mo. 1991).

[81] Johnson v. Independent Sch. Dist. No. 281, 479 N.W.2d 392 (Minn. Ct. App. 1991).

[82] Hall v. Seattle Sch. Dist. 1, 831 P.2d 1128 (Wash. Ct. App. 1992).

Aspects of Hearing

A number of issues have arisen in this section, including the impartiality of the hearing board, the role of the school board attorney, and board latitude in granting continuances. Payment of a *per diem* stipend by a school board to a hearing panel member beyond that which was the established stipend to be paid was sufficient impropriety to have violated the due process rights of a teacher whose dismissal on the grounds of incompetency was being considered.[83] The court determined that actual bias did not have to be shown and "even the appearance of impropriety must be avoided."[84] In a case interpreting the Alabama Fair Dismissal Act's requirement stipulating that a "fair and impartial" decision by the neutral member of the three-member panel applied to all three members, a federal court was in error in attempting to interpret state law when the issue had never arisen before. Since the court had dismissed the only federal claim under section 1983, the court should have remanded the case to state court to determine this state issue of first impression.[85]

Dual roles played by a school board attorney as legal advisor and prosecutor prejudiced a teacher at her evidentiary hearing on misconduct charges and required that the suspension order be vacated.[86] In Florida it is well settled "that traditional notions of justice and fair play require an administrative board conducting disciplinary proceedings to designate one person to act as its legal advisor and a different person to fulfill the role of prosecutor."[87]

A principal lost in his due process claim that the State Board of Education, in a hearing to revoke his principal's certificate, denied him due process when it denied his motion to delay the hearing until the next day. The principal was unable to produce evidence that continuance of his hearing late into the night prejudiced his case. His request for lunch had been granted, his witness testified fully, and the principal testified in great length.[88] Similarly, the Missouri Supreme Court ruled that refusal of a school to grant a continuance of a tenured teacher's termination hearing at 2:15 a.m. was not an abuse of discretion, where no evidence had been presented that the teacher, attorney, or witnesses were in any way exhausted or unable to perform their duties.[89]

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[83] Syquia v. Board of Educ. of Harpursville Cent. Sch. Dist., 579 N.Y.S.2d 487 (App. Div. 1992).

[84] *Id.* at 488.

[85] Hardy v. Birmingham Bd. of Educ., 954 F.2d 1546 (11th Cir. 1992).

[86] Forehand v. School Bd. of Gulf County, 600 So. 2d 1187 (Fla. Dist. Ct. App. 1992).

[87] *Id.* at 1190.

[88] Bills v. Arizona State Bd. of Educ., 819 P.2d 952 (Ariz. Ct. App. 1991).

[89] Moore v. Board of Educ. of Fulton Pub. Sch. No. 58, 836 S.W.2d 943 (Mo. 1992).

Dismissal, Nonrenewal, Demotion, and Discipline

A wide range of topics of a general nature were considered, including use of administrative results in criminal cases, school board privilege, whether action toward an employee constituted discipline, improper or excessive discipline, reasons for discipline, eligibility for unemployment compensation, and constructive discharge. Administrative discharge proceedings are generally governed by a different standard from criminal actions, but proceedings in one venue can affect the other. In one case, an employee's criminal conviction was reversed where testimony that an employee had been discharged following an administrative hearing prompted by the filing of criminal charges had been erroneously admitted in the criminal trial.[90]

In considering nonrenewal or discharge matters, a federal district court interpreted Illinois state law as creating a deliberative process privilege that protects school board expressions of opinion or recommendations and that can also protect strategies for trial and case preparation.[91]

Transfers of employees may require a due process hearing. However, in Alabama, a reassignment of a teacher from teaching advanced English students to tutoring remedial level students in grammar skills did not constitute a transfer where, even though the teacher taught different students, she taught the same English concepts at the same grade level.[92] Likewise, changes in scheduled work hours of nonprobationary school custodians were neither transfers nor partial terminations under Alabama's Fair Dismissal Act entitling the custodians to a hearing and reassignment.[93] A school superintendent who had negotiated a contract with the school board containing a provision permitting the board to unilaterally terminate him and pay off the balance of the contract, had acquiesced in the terms of the contract and had no constitutional claims under section 1983 for tortious interference with contract.[94] Temporary assignments of classified teachers in Indiana prisons from teaching functions to clerical functions during lockdowns did not constitute a demotion under the State Personnel Act so as to require compliance with the same procedures used for dismissal. In this case where teaching functions were eliminated for a few days while all prisoners were locked in their cells, use of the teachers to perform clerical functions in the place of the guards conducting cell searches did not constitute the kind of permanence intended by the Personnel Act.[95]

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[90] State v. Black, 600 N.E.2d 389 (Ohio Ct. App. 1991).

[91] Bobkoski v. Board of Educ. of Cary Consol. Sch. Dist. 26, 141 F.R.D. 88 (N.D.Ill. 1992).

[92] Marsh v. Alabama State Tenure Comm'n, 589 So. 2d 752 (Ala. Civ. App. 1991).

[93] Ike v. Board of Sch. Comm'rs of Mobile County, Ala., 601 So. 2d 1014 (Ala. Civ. App. 1992).

[94] Mitchell v. Skinner, 796 F. Supp. 1464 (N.D. Ala. 1992).

[95] Indiana State Prison and State Employees Appeals Comm'n v. Van Ulzen, 582 N.E.2d 789 (Ind. 1991).

In terms of whether school district punishment was excessive, a New York court determined that a senior custodian's dismissal was not excessive where he had falsely reported and verified time sheets and had reentered a school district building to remove a folder of documents.[96] A Pennsylvania school district that had improperly discharged three employees was ordered to pay $39,000 each to two of the three. The third former employee was awarded almost $92,000, which included back pay and interest as well as reimbursement of medical expenses, which would have been covered under the school district medical plan had the employee not been discharged. While discharged employees are required to mitigate damages, the burden is on the breaching party to show the losses that could have been avoided, a burden not met by the school district in this case.[97] A probationary teacher who alleged that members of the support team assigned to help her were biased against her, resulting in a recommendation of nonrenewal, was unsubstantiated after the superintendent investigated the team and found no evidence of bias.[98] Under Colorado's Tenure Act, a teacher who had permitted her teaching certificate to expire could be discharged for "other good and just cause."[99] Suspension imposed on a school maintenance worker for using school vehicles was appropriate even in the absence of a written policy because the worker admitted that such use was wrong.[100]

A high school teacher who had submitted his resignation after receiving notice of proposed nonrenewal of his contract for the coming year did not voluntarily resign without good cause connected to his work and was not disqualified for unemployment compensation.[101] A janitor who had been demoted for illegal entry and attempted theft of school property and who resigned six months later was considered to have voluntarily quit and thus was not eligible for unemployment compensation benefits.[102] In a Tennessee case, a high school teacher returning after a one-year medical leave of absence was determined to have been constructively discharged when she was assigned by the superintendent to teach the fifth grade upon her return.[103] Under Tennessee law, the teacher could not be forced "to accept a teaching assignment [within the school district] that was not 'comparable' to her former position as a senior English teacher.'"[104]

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[96] Clark v. Canandaigua City Sch. Dist., 579 N.Y.S.2d 275 (App. Div. 1992).

[97] *In re* Edge, 606 A.2d 1243 (Pa. Commw. Ct. 1992).

[98] Spry v. Winston-Salem/Forsyth County Bd. of Educ., 412 S.E.2d 687 (N.C. Ct. App. 1992).

[99] Snyder v. Jefferson County Sch. Dist. R-1, 821 P.2d 840 (Colo. Ct. App. 1992).

[100] Howland v. Schuyler-Chemung-Tioga Bd. of Coop. Educ'al Servs., 578 N.Y.S.2d 723 (App. Div. 1992).

[101] Madisonville Consol. Indep. Sch. Dist. v. Texas Employment Comm'n, 821 S.W.2d 310 (Tex. Ct. App. 1991).

[102] Henderson v. Department of Employment Sec., 595 N.E.2d 96 (Ill. App. Ct. 1992).

[103] State *ex rel.* McGhee v. St. John, 837 S.W.2d 596 (Tenn. 1992).

One teacher sought a remedy based on constructive discharge. A special education teacher who allegedly resigned because of harassment that made her working conditions intolerable lost in her legal claims based on constructive discharge. Allegations in her complaint of two instances where her principal had raised his voice toward her in the presence of other employees and resentment toward the school psychologist for treating her as a subordinate did not as a matter of law constitute the basis for intolerable conditions for a constructive discharge.[105]

School districts may have a responsibility to employees after the period of discipline has been completed. A teacher suspended following arrest on a drug charge was entitled to an award of back pay after he had completed a diversion program under the penal code resulting in charges being dismissed. However, earnings received by the teacher during the suspension had to be offset against the amount of backpay.[106]

Improper discipline may also have its price for a school district. A school district which had improperly suspended without pay a teacher that it alleged refused to return to work was ordered to pay back wages. The result in this case revolved around the inability of the district to prove that the suspension was tied to the alleged refusal to return to work.[107]

The extent to which school boards can alter the findings of a hearing officer may affect the penalty imposed. In Florida, a school board did not violate state statute in adopting the findings of fact and conclusions of law of a hearing officer, but increased the penalty, as long as the penalty was within the guidelines established by statute.[108]

Insubordination

The cases in this section were approximately evenly divided between employees who were discharged for insubordination and those who prevailed against such a charge. Discharges were upheld in two cases involving lesson plans. In a case that may seem harsh to some, a tenured high school teacher who had been found guilty of failing to prepare proper lesson plans was fined $8,000 payable in twenty-six biweekly installments.[109] In upholding the fine as not excessive, a New York appeals court determined that "formal lesson plans . . . [are] indispensable to effective teaching."[110] A school district's dismissal of a teacher for insubordination was upheld when the teacher had refused to turn over her lesson plans and grade books. However, the school district had no basis for directing the teacher to rescind an assignment and such attempts constituted an unreasonable intrusion into the teacher's academic freedom.[111]

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[104] *Id.* at 602.

[105] Hammond v. Katy Indep. Sch. Dist., 821 S.W.2d 174 (Tex. Ct. App. 1991).

[106] Unzueta v. Ocean View Sch. Dist., 8 Cal. Rptr.2d 614 (Ct. App. 1992).

[107] Janke v. Community Sch. Bd. of Community Sch. Dist. No. 19, 587 N.Y.S.2d 733 (App. Div. 1992).

[108] Chase v. Pinellas County Sch. Bd., 597 So. 2d 419 (Fla. Dist. Ct. App. 1992).

[109] Meyer v. Board of Educ. of the Charlotte Valley Cent. Sch. Dist., 581 N.Y.S.2d 920 (App. Div. 1992).

Two insubordination cases involved conduct on school premises. A teacher-principal who had carried and discharged a firearm on school property in violation of a school board policy prohibiting staff members from possessing firearms on school property, except as authorized by the superintendent of schools, was rightfully discharged. The fact that the principal sometimes carried large amounts of cash from tuition monies, that the school had no security, and that outsiders caused much of the violence made no difference in the result.[112] Slapping a student with a disability and inability to maintain classroom control were sufficient evidence to warrant dismissal of a special education teacher in charge of a class of five-to-seven students. In attempting to bring order to the classroom, the teacher had the assistance and recommendations of the school principal, two district psychologists, and the former special education teacher.[113]

Employees were successful in several cases. A tenured teacher whose employment had been terminated because of insubordination was entitled to reinstatement when the principal's prior directive to the teacher to never use physical discipline was contrary to district policy that reasonable and prudent force could be used for the purpose of maintaining order.[114] The principal's order to the teacher, given after complaints about mild physical contact as discipline, "cannot be reconciled if, as here, it unequivocally divests a teacher of authority expressly granted to that teacher pursuant to a school district's own written policies."[115] A Minnesota teacher who had been suspended for mental reasons was not insubordinate when she refused to submit to a school board-ordered examination to determine her fitness to return. Once one of the doctors on the panel that had recommended her suspension determined that her problems had been alleviated, the teacher was entitled to reinstatement under state statute and the school board could not require an examination not required by the statute.[116] In what an Ohio appeals court referred to as "extensive bureaucratic stonewalling," the court upheld a backpay award for a reinstated substitute bus driver, even though substitute drivers were used only "as needed." In issuing a writ of mandamus the court noted that in the four years since the driver had been ordered reinstated by the state civil service commission following discharge for alleged insubordination, the driver had never been called as a substitute even though evidence indicated that there was no decline in the need for the services of substitute drivers. The court refused to treat this case as one of administrative discretion because the school district had thwarted every effort by the reinstated driver to return to driving.[117] In Florida, a school district failed in its attempt to terminate a custodian who had shown disrespect for the principal and had created friction and disagreement between the principal and other employees.[118] However, the court observed that if the custodian "had been given a warning directing him to cease his disruptive campaign in favor of the fired custodian and against the principal our result would almost certainly be different."[119]

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[110] *Id.* at 922.

[111] Malverne Union Free Sch. Dist. v. Sobol, 586 N.Y.S.2d 673 (App. Div. 1992).

[112] Burton v. Alabama State Tenure Comm'n, 601 So. 2d 113 (Ala. Civ. App. 1992).

[113] Hendrickson v. Spartanburg County Sch. Dist. No. Five, 413 S.E.2d 871 (S.C. Ct. App. 1992).

[114] Fredrickson v. Denver Pub. Sch. Dist. No. 1, 819 P.2d 1068 (Colo. Ct. App. 1991).

[115] *Id.* at 1072.

[116] *In re* Mary Silvestri's Teaching Contract with Indep. Sch. Dist. No. 695, 480 N.W.2d 117 (Minn. Ct. App. 1992).

Unprofessional Conduct, Unfitness, Willful Neglect of Duty

These grounds for discipline are quite broad and generally school districts are successful in their discipline actions. A former assistant principal was justifiably demoted to classroom teacher on the grounds of willful negligence when he was repeatedly tardy to work and had left campus on at least five occasions during the school day without permission.[120] A teacher's discharge for conduct unbecoming a teacher was upheld after the teacher was found to have given controlled substances to a juvenile teaching aide and to have engaged in sexual activity with the aide. The charge of sexual activity was upheld even though the students did not testify because the hearing officer had found the credibility of the teacher's denial to be suspect.[121] A school district had sufficient grounds to discharge a teacher arrested for shoplifting, especially in light of evidence that she had not been a good role model for the students prior to the shoplifting incident. The discharge was upheld despite a contention that the teacher's shoplifting was the result of medically induced mania.[122] An assistant superintendent suspended with pay for mishandling money and who was determined to have received improper cash advances in excess of actual expenditures in the sum of $31,530 could have the sum recouped from future paychecks. The assistant superintendent's claim that withholding his salary was a breach of his contract was dismissed by the court.[123] A California statutory requirement that a teacher must be provided forty-five days written notice prior to filing a charge of unprofessional conduct did not apply to a charge of evident unfitness for service. The cumulative effect of the teacher's actions in confronting a substitute, belittling students, and repeatedly calling into question the ability of the principal supported the charge.[124] Termination of a tenured teacher was upheld for use of profanity, shouting, and chasing and physically handling students. Although school board policy required consideration of items for termination based on material in the personnel file, the teacher had not been prejudiced by the use of a number of other incidents where he had an opportunity to respond at the time of each complaint. Because of this opportunity to respond to the incidents the teacher could not claim to have been surprised or prejudiced by the charges.[125]

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[117] State *ex rel.* Bryant v. Kent City Sch. Dist. Bd. of Educ., 595 N.E.2d 410 (Ohio Ct. App. 1991).

[118] Rosario v. Burke, 605 So. 2d 523 (Fla. Dist. Ct. App. 1992).

[119] *Id.* at 524.

[120] Hargis v. Lafourche Parish Sch. Bd., 593 So. 2d 400 (La. Ct. App. 1991).

[121] Hall v. Board of Educ. of City of Chicago, 592 N.E.2d 245 (Ill. App. Ct. 1992).

[122] Board of Directors of the Lawton – Bronson Community Sch. Dist. v. Davies, 489 N.W.2d 19 (Iowa 1992).

In the one case in which an employee was successful, the dismissal of a bus driver charged with operating a school bus "in an unsafe, uncontrolled, and negligent manner" was annulled because the findings of fact that the driver was guilty of intentional misconduct were outside the scope of the charges.[126]

Immorality

In the only case reported under this section, theft of funds belonging to a parent-teacher organization was an immoral act for which a tenured school bus driver could be dismissed.[127]

Incompetence

Incompetence tends to generate relatively few cases, presumably because it is difficult to prove. Nonetheless, most of the disciplinary actions on the basis of incompetence were successful. Dismissal of a superintendent was upheld for inadequately supervising the school district's budgetary and fiscal affairs with the result that the district had a $500,000 deficit. However, in upholding the dismissal decision of a hearing officer, the court also observed that the perceived fear that school district taxpayers might not vote for a tax increase if the current superintendent continued in office, was not within the permissible range of good

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123. Duffy v. Poughkeepsie City Sch. Dist., 583 N.Y.S.2d 658 (App. Div. 1992).
124. Woodland Joint Unified Sch. Dist. v. Commission on Professional Competence, 4 Cal. Rptr.2d 227 (Ct. App. 1992).
125. Cotherine v. Board of Educ. of City of St Louis, 822 S.W.2d 881 (Mo. Ct. App. 1991).
126. Benson v. Board of Educ. of Washingtonville Cent. Sch. Dist., 583 N.Y.S.2d 594 (App. Div. 1992).
127. Rochon v. Iberia Parish Sch. Bd., 601 So. 2d 808 (La. Ct. App. 1992).

cause for dismissal.[128] A tenured driver education teacher who had been convicted of one DUI charge, was currently in the process of going to trial on a second DUI charge, had his driver's license suspended for two months, and had his car insurance canceled fit the definition of incompetent, because his failure to have a driver's license and insurance made him unable to perform the majority of his teaching assignment. Incompetency under Alabama law means "disqualification, inability, or incapacity to fulfill the necessary teaching duties."[129] Termination of a tenured teacher was sufficiently proved by errors in attendance reports and in midquarter and quarterly progress reports. The state's "meet and confer" requirement prior to termination of tenured faculty was satisfied by a warning letter, meeting with the superintendent to discuss deficiencies, observation by a teaching area specialist over five weeks, and assistance by the school counselor and secretary in satisfying reporting requirements.[130]

An employee was successful in only one case involving incompetency. In a case regarding a much publicized continuing contract during the summer, the decision by a school board at the end of August to suspend the teacher in question without pay on the grounds of incompetency, immorality, and misconduct in office was reversed.[131] The teacher had brought her former husband (who had suffered a disabling stroke and whom she subsequently remarried) into her home and shortly thereafter pleaded *nolo contendere* to a criminal charge of abuse of an aged or disabled person. In reversing the school board, a Florida court observed that the court had received no expert testimony to prove incompetency, that the board had failed to meet statutory notice requirements concerning immorality, and that a plea of *nolo contendere* to a criminal charge was not conclusive grounds for dismissal.[132]

Compliance with School Board Policies and State Statutes

Dismissal proceedings may be required to be commenced within a certain statutory period of time. In an Alabama case, the state Employee Review Panel lost jurisdiction to hear a termination case when it failed to convene within sixty days of the school board's decision.[133] In that same case, an Alabama court determined that a school board's punishment could be modified when the board's decision was not supported by the facts.[134]

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[128] Board of Educ. of Smyrna Sch. Dist. v. DiNunzio, 602 A.2d 85 (Del. Super. Ct. 1990).

[129] Alabama State Tenure Comm'n v. Lee County Bd. of Educ., 595 So. 2d 476 (Ala. Civ. App. 1991).

[130] Nevels v. Board of Educ. of Sch. Dist. of Maplewood–Richmond Heights, 822 S.W.2d 898 (Mo. Ct. App. 1991).

[131] Clark v. School Bd. of Lake County, Fla., 596 So. 2d 735 (Fla. Dist. Ct. App. 1992).

[132] *Id.* at 739.

[133] Birmingham Bd. of Educ. v. Holifield, 604 So. 2d 418 (Ala. Civ. App. 1990).

A significant number of cases concerned school board compliance with state statutes pertaining to nonrenewal of tenured or probationary employees. In a number of cases, courts found that employees had been denied rights under the statutes. The Pennsylvania Public School Code which provides for the right to a hearing when a demotion occurs applied to the reassignment of an elementary school principal to a newly created position within the school district's central administration where the principal had been locked out of her office, her supervisory and evaluative duties had been increased tenfold, and she had suffered overwhelming loss of responsibility, dignity, and prestige.[135] A nontenured teacher who had not received thirty days notice of nonrenewal as required by state statute was entitled to a writ of mandamus ordering the school district to pay her thirty days salary.[136] A Louisiana statute requiring every person returning from sabbatical leave to be returned at the beginning of the semester to the same position at the same school from which the leave was taken was interpreted narrowly to unambiguously prohibit a school board from transferring a tenured teacher from a freshman high school to an elementary school within the same school system.[137] A limited contract teacher in Ohio who was not eligible for a continuous contract was improperly nonrenewed by the school board after the superintendent had recommended renewal of the contract. In narrowly interpreting the school board's authority to nonrenew under the statute, an Ohio court decided that the teacher had not received an evaluation of two classroom observations by February 10 as required by statute.[138] Under Alabama statute, a school board terminating a nonprobationary teacher is required to continue the teacher's pay until the board has held a due process hearing and terminated employment. A school board is not required to continue payment while the teacher is pursuing an appeal of the termination decision.[139] A Pennsylvania statute which provided that a professional employee could be removed for "curtailment or alteration of the educational program," did not permit suspension of an assistant principal for nonresidential or purely economic reasons.[140] In a narrow interpretation of the Ohio nonrenewal statute, the state supreme court stated that a letter of nonrenewal that gave clear notice of nonrenewal and indicated that it was written on behalf of the school board did not meet the statutory requirements.[141]

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[134] Birmingham Bd. of Educ. v. Holifield, 604 So. 2d 422 (Ala. Civ. App. 1991).

[135] Joyce v. Spring-Ford Area Sch. Dist., 600 A.2d 1302 (Pa. Commw. Ct. 1991).

[136] Mutschler v. Board of Educ. of William Floyd Union Free Sch. Dist., 576 N.Y.S.2d 590 (App. Div. 1991).

[137] Comeaux v. Iberia Parish Sch. Bd., 597 So. 2d 1263 (La. Ct. App. 1992).

[138] Farmer v. Kelleys Island Bd. of Educ., 594 N.E.2d 204 (Ohio Ct. Common Pleas 1992).

[139] *Ex parte* Birmingham Bd. of Educ., 601 So. 2d 93 (Ala. 1992).

[140] Somerset Area Sch. Dist. v. Starenchak, 599 A.2d 252 (Pa. Commw. Ct. 1991).

The school districts prevailed in a number of cases. In Missouri, a warning letter prior to nonrenewal containing general reasons was adequate where the teacher had received numerous prior evaluations written in language identical to the warning letter.[142] A teacher not hired for a third year, which would have granted him tenure, had no cause of action under a state statute providing that nontenured teachers were to be evaluated three times each year. The plaintiff in this case had been evaluated only once during his second year.[143] A school district employee whose title was assistant superintendent for curriculum and instruction was not entitled to the statutory procedural rights accorded to teachers after his position had been terminated.[144] In a case under the Texas whistle blower statute, a custodian hired by a servicing company who was fired for reporting theft from machines to the school administration instead of directly to the servicing company had no remedy under the statute because he was not a public employee.[145] In Mississippi, a conflict of interest due to a husband's membership on the school board and his wife's employment as a teacher obligated both the husband and wife to repay the teacher's salary, even though the husband and wife acted in good faith and the school district received value.[146]

In a case under Iowa's Open Record statute, a newspaper was entitled to access to the settlement agreement between the school district and the school principal, but not to documents focusing on the job performance of district employees collected by committee investigations of racism and sexism, documents generated by a committee formed to investigate complaints against the school principal, and documents gathered from sources outside the district following the settlement agreement.[147]

One case concerned the relationship between a state constitution and a county law. A county tenure act indicating that county officers were not eligible to succeed themselves after two successive terms did not apply to county superintendents because the state constitution had separate, specific provisions concerning the qualifications, term of office, and method of selection of school superintendents.[148]

One case involved a school district policy. A tenured elementary teacher could be dismissed for violating a school policy prohibiting leaving students for more than a few minutes without a staff member being present. In this case the teacher had left seven students in the classroom to complete school work while she went outside to supervise the remainder of the students at recess and in her absence several of the students removed the clothing of a female student.[149]

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[141] State *ex rel.* Luckey v. Etheridge, 583 N.E.2d 960 (Ohio 1992).

[142] O'Connell v. School Dist. of Springfield R-12, 830 S.W.2d 410 (Mo. 1992).

[143] Marotta v. Greater New Bedford Regional Vocational Technical High Sch. Dist. Comm., 589 N.E.2d 334 (Mass. App. Ct. 1992).

[144] Boschee v. Mandan Pub. Sch. Dist., 478 N.W.2d 276 (N.D. 1991).

[145] Alaniz v. Galena Park Indep. Sch. Dist., 833 S.W.2d 204 (Tex. Ct. App. 1992).

[146] Waller v. Moore *ex rel.* Quitman County Sch. Dist., 604 So. 2d 265 (Miss. 1992).

[147] Des Moines Indep. Community Sch. Dist. Pub. Records v. Des Moines Register & Tribune Co., 487 N.W.2d 666 (Iowa 1992).

[148] Bradfield v. Wells, 415 S.E.2d 638 (Ga. 1992).

Several cases concerned unemployment compensation claims. In a case illustrating the different standards applied between dismissal of a teacher for misconduct and eligibility for unemployment compensation benefits, a Florida court determined that a preschool teacher discharged for leaving her class unattended while searching outside for a missing student was nonetheless eligible for unemployment benefits because her actions "were, at most, bad judgment and not misconduct."[150] A teacher terminated after an altercation with another physical education instructor was nonetheless entitled to unemployment compensation because "[w]hether a claimant is guilty of misconduct is a factual issue for the Unemployment Insurance Appeal Board to resolve." In this case, the Board found that there had been no physical contact and that claimant's co-worker was the one who had become angry and raised his voice.[151] Similarly, in an Iowa case, a superintendent discharged for refusing to answer school board questions was nonetheless entitled to unemployment compensation benefits because the board could not prove intentional commission of acts detrimental to the board.[152] Likewise, in Louisiana, termination of a food serving technician for creating negative tension in the school cafeteria could be upheld, even though the worker had been ruled eligible for unemployment compensation benefits.[153]

On the other hand, school employees have been ruled to be ineligible for unemployment compensation benefits in a variety of fact situations. A teacher in Oregon who had been told there would be substitute teacher work for her in the fall and who had a long history of teaching successive terms without notification of the school district's intent to reemploy her was disqualified from recovering unemployment benefits.[154] A similar result was reached in a New York case where the school board had sent a letter to substitute teachers that "the need for substitutes in the upcoming year [will be] as great as it [was] been the previous year."[155] Long term substitute teachers in Philadelphia who had received assurance at the end of the school year that they would be employed in the subsequent school year as per diem substitute teachers had received reason-

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149. Burgess v. Ferguson Reorganized Sch. Dist., R-2, 820 S.W.2d 651 (Mo. Ct. App. 1991).

150. Rogers v. Florida Unemployment Appeals Comm'n, 597 So. 2d 382 (Fla. Dist. Ct. App. 1992).

151. *In re* Warnock, 583 N.Y.S.2d 614, 615 (App. Div. 1992).

152. West v. Employment Appeal Bd., Dep't of Inspections and Appeals, 489 N.W.2d 731 (Iowa 1992).

153. Harris v. West Carroll Parish Sch. Bd., 605 So. 2d 610 (La. Ct. App. 1992).

154. Armstrong v. Employment Div., 832 P.2d 1233 (Or. Ct. App. 1992).

155. *In re* Luchun, 588 N.Y.S.2d 217 (App. Div. 1992).

able assurances of performing services the next academic year so as to *make them ineligible for unemployment benefits.*[156] *In a different vein,* former employees of an organization overseeing the federally funded Headstart program in a Louisiana parish had a cause of action under state statute for allegedly being discharged for filing unemployment compensation claims. However, the cause of action depended on the employees being able to prove that they had been hired pursuant to a contract of definite duration.[157]

In a case where a driver education teacher had been discharged because his license had been suspended and his insurance canceled, the school district still had a responsibility to determine whether there were other vacant positions for which he would be qualified. The Alabama Supreme Court remanded this case to determine whether two non-tenured teachers, hired after the driver education teacher was discharged, filled positions for which the driver education teacher was qualified.[158]

Several cases concerned procedural matters. In a case involving appeal procedures under a state statute and a collective bargaining agreement, the four-month statute of limitations was applicable from the date of termination by the Chancellor. A subsequent hearing before the school board pursuant to the collective bargaining agreement did not toll the four-month statute of limitations to bring an action in court and, when the teacher's judicial petition was filed more than four months after the termination, his petition was denied.[159] In a Colorado case, an appeal from a discharged tenured teacher was filed within the forty-five day statute of limitations in effect when the charges against the teacher were filed, even though the limitation period had been reduced shortly thereafter to twenty days.[160] In a Texas case, a school board granting an evidentiary hearing to an elementary principal charged with mismanagement of funds and sexual harassment precluded the board from holding in abeyance a decision as to whether the appeal to the board was timely.[161]

Reduction-in-force and Involuntary Leaves of Absence

Reorganization or consolidation of school districts or property within districts, declining student enrollments, or fiscal restraints may necessitate a reduction-in-force (RIF). The sufficiency of reasons for RIF, the actual selection of employees to be laid off, the realignment or reassignment of employees, and call-back rights are governed by state tenure statutes, local board policies, and collective bargaining agreements.

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[156] Board of Educ., Sch. Dist. of Philadelphia v. Unemployment Compensation Bd. of Review, 609 A.2d 596 (Pa. Commw. Ct. 1992).

[157] Fontenot v. Manpower Motivation, Educ. and Training, Inc., 594 So. 2d 998 (3d Cir. 1992).

[158] *Ex parte* Alabama State Tenure Comm'n, 595 So. 2d 479 (Ala. 1991).

[159] Schulman v. Board of Educ. of City of N.Y., 584 N.Y.S.2d 914 (App. Div. 1992).

[160] Loredo v. Denver Pub. Sch. Dist. No. 1, 827 P.2d 633 (Colo. Ct. App. 1992).

[161] Hernandez v. Meno, 828 S.W.2d 491 (Tex. Ct. App. 1992).

RIF can be affected in a variety of ways by state statutes. A school employee, working as an educational assistant, whose employment had been terminated at the end of the school year for economic reasons was not entitled to unemployment compensation after the date the school district notified the employee he would be rehired in the fall.[162] A New Jersey court has upheld a ninety-day limitation on appeals by school employees who have been RIFed. However, even though the assistant superintendent who lost his appeal was precluded from challenging the RIF for his former position, his tenure protection extended to any assistant superintendent assignment within the scope of his certificate.[163] An interesting Illinois case involved both determination of dismissal without following a remediation process and a subsequent elimination of the position through RIF. An Illinois appeals court determined that elimination of a position through RIF to which a teacher had earlier been ordered to be reinstated must be taken into consideration in evaluating the impact on damages and reinstatement.[164]

Necessity for Reduction-in-force

Eleven classified civil service employees who had been demoted or laid off from their janitorial positions, and nine of whom were later recalled, were all entitled to compensation, less other earned compensation or unemployment compensation benefits, during the period of unemployment. In upholding the issuance of a writ of mandamus, the Ohio Supreme Court found that the school district had failed to offer any evidence that the layoffs were for financial reasons as it had alleged.[165]

Elimination of Position

Layoff provisions of a collective bargaining agreement in Kansas operated as a waiver of the tenured teacher-plaintiff's due process right to notice before being laid off for economic reasons unrelated to his performance. Where the teacher had been laid off, rather than terminated, after his position had been eliminated, he was not entitled to statutory notice required for termination or nonrenewals.[166] In interpreting its statutes, the West Virginia Supreme Court determined that a principal position could not be eliminated and a principal could not be demoted to a teaching position without first eliminating central office administrators. The statutory order for reductions-in-force was: central office administrators, assistant principals, and then principals.[167]

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[162] Swanson v. Independent Sch. Dist. No. 625, 484 N.W.2d 432 (Minn. Ct. App. 1992).

[163] Kaprow v. Board of Educ. of Berkeley Township, 604 A.2d 640 (N.J. Super Ct. 1992).

[164] Board of Educ. of Pope County Community Unit Sch. Dist. No. 1 v. State Bd. of Educ., 583 N.E.2d 701 (Ill. App. Ct. 1991).

[165] State *ex rel.* Bush v. Spurlock, 588 N.E.2d 840 (Ohio 1992).

Selection of Employees

In North Dakota, a seven quality system used by a superintendent to select a teacher to be nonrenewed was upheld as long as the information provided by the system "had some reasonable relevance to the teacher's qualities and qualifications."[168] In an Oklahoma case, a school district's RIF plan by which tenured faculty were prevented from changing classifications in order to be considered for classroom assignments in subjects they were qualified to teach, but under which nontenured teachers were not subject to similar restrictions, violated the teacher tenure statute by giving tenure-like priority to nontenured faculty, in effect elevating them to the status of tenured faculty.[169] In selecting a tenured first grade teacher to be nonrenewed because of declining student enrollments, the superintendent and school board could consider comments of parents regarding plaintiff's teaching methods and classroom discipline. The collective bargaining agreement gave the administration and school board sole discretion in determining teacher performance for purposes of nonrenewal and, unless the decision was arbitrary, the plaintiff-teacher had no justiciable complaint.[170]

Realignment/Reassignment

Where a collective bargaining agreement provides that all disputes under the contract are to be decided by a grievance procedure, neither a school board nor a hearing examiner in Minnesota had the authority to resolve reassignment disputes.[171] A breach of contract action by a continuing contract teacher reassigned from a petro chemical high school magnet program to a junior high where he was assigned to teach math at a lower salary was dismissed when he failed to exhaust his administrative remedies.[172]

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166. Thompson v. Unified Sch. Dist. No. 259, Wichita, 819 P.2d 1236 (Kan. Ct. App. 1991).
167. Board of Educ. of County of Grant v. Townshend, 418 S.E.2d 359 (W. Va. 1992).
168. Kent v. Sawyer Pub. Sch. Dist. No. 16, 484 N.W.2d 287, 289 (N.D. 1992).
169. Babb v. Independent Sch. Dist. No. I-5 of Rogers County, Okla., 829 P.2d 973 (Okla. 1992).
170. Mackey v. Newell—Providence Community Sch. Dist., 483 N.W.2d 5 (Iowa Ct. App. 1992).
171. *In re* Dillenburger, 486 N.W.2d 17 (Minn. Ct. App. 1992).
172. Caramanian v. Houston Indep. Sch. Dist., 829 S.W.2d 814 (Tex. Ct. App. 1992).

Call-back Rights

In a close ruling, the Minnesota Court of Appeals decided that a teacher's five-year unrequested leave of absence was effective to the end of the contract year rather than the last day of work and therefore the teacher was entitled to reinstatement when a position became available on the last day of the contract year.[173] Under an Arizona statute, a teacher dismissed because of RIF was entitled to an offer of reappointment even though the teacher had signed a contract to teach in another school district.[174]

Contract Disputes

Many types of problems can arise concerning the contract of employment: the validity of the contract; the inclusion of ancillary administrative, statutory, collective bargaining, and other provisions; and questions regarding breach of contract. Like other contracts, employment contracts require an offer, consideration, and acceptance. Contracts can frequently be fact specific depending on the terms of individual documents. A tenured teacher in a Kentucky county who was hired in another Kentucky county was not, as she alleged, hired as a continuous contract teacher where her new contract stated, "Limited Contract of Employment."[175]

Board Policies and Contract Stipulations

An elementary principal who had one year to run on her contract, and who was assigned to a classroom for that last year at a rate of pay prior to the issuance of the principal contract, stated a breach of contract action against the school district. Not only did plaintiff have a valid contract, but she had not been provided the thirty-day notice not to renew her contract as required by state statute.[176] A school district's attempt to treat a teacher reassignment as a new contract offer that could be withdrawn by the board was unsuccessful where the superintendent had in fact made the reassignment pursuant to a section in the contract for the subsequent year which the teacher had already signed.[177]

Express contract language can be important. In a Georgia case, a teacher's acceptance of a school board stipend to take courses for a different certification did not constitute assent to amend the teacher's contract, where the contract expressly stated that any amendment had to be in writing.[178] In a Montana case, an employee who had signed several one-year contracts with a provision for nonrenewal could not claim breach of implied covenant of good faith and fair dealing and wrongful discharge when her one-year contract was not renewed. Under state law, alleged implied covenants of good faith and fair dealing based on representations made after entry into the written contract (representations in this case were that the job was permanent) would, if proved, be invalid because an agreement in writing could not be altered except in writing or by executed oral agreement.[179]

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[173] *In re* Johnson, 481 N.W.2d 882 (Minn. Ct. App. 1992).

[174] Hampton v. Glendale Union High Sch. Dist., 837 P.2d 1166 (Ariz. Ct. App. 1992).

[175] Board of Educ. of Perry County v. Jones, 823 S.W.2d 457 (Ky. 1992).

[176] Murray v. Monroe Gregg Sch. Dist., 585 N.E.2d 687 (Ind. Ct. App. 1992).

[177] Dean v. Pringle, 592 So. 2d 49 (Miss. 1991).

A contract claim can also fail because resolution of the dispute belongs in a forum different from a court. A tenured twelve-month adult education coordinator who had been transferred at his request to an eleven-month assistant principal position did not have a breach of contract action where the only way he could maintain his salary at the former twelve-month basis was to agree to work as a summer school coordinator. The court determined that any disparity between his employment agreement and the agreement for the other assistant principals was a matter for the Tenure Commission and, since plaintiff had not pursued his administrative remedy, he was precluded from pursuing a breach of contract action.[180]

In a case unique to New York City, the Chancellor of the City School District of the City of New York acted within his authority in specifying the procedures to be followed in hiring community superintendents and in requiring school boards to submit written evaluation reports.[181]

Administrative Regulations and Statutory Provisions

The largest group of cases in this section dealt with pension or retirement issues. For purposes of determining whether a paraprofessional teacher's aide was eligible to participate in a Rhode Island employees' retirement system, the aide was considered to be a municipal employee with the city rather than a teacher with the school committee. Since the local city council had acted pursuant to the early retirement plan to exclude all municipal workers, the teacher's aide was not eligible for early retirement benefits.[182] A state retirement system's use of a different formula to calculate days for pension credit from the formula used to calculate unused sick days was upheld even though the effect of the application for unused sick days leave was that a deceased teacher's years of service fell thirty-six days short of twenty-five years needed for his beneficiary to receive full service retirement benefits and the difference in benefits to the beneficiary was approximately $170,000.[183] An elementary teacher who suffered a back injury as a result of extensive bending in the classroom to help students was entitled to retirement disability because the bending was the natural and proximate result of a job condition that distinguished her work from other occupations and other forms of teaching.[184] In a Pennsylvania case, a school principal who had retired the year after the school board had paid him an additional $16,000 argued that the entire sum should have been added to his income for purposes of computing the principal's income for retirement benefit purposes. In interpreting the state's Public School Employees' Retirement Code, the court determined that the payment was for severance which is excluded from retirement benefits calculation.[185] Income received by a school board employee for duties as clerk of works/construction consultant, in addition to his duties as supervisor of buildings and grounds, was pension creditable since the clerk/consultant services had been performed over fourteen years with one brief hiatus and was not a temporary duty.[186]

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[178] Elbert County Bd. of Educ. v. Shankle, 421 S.E.2d 536 (Ga. 1992).

[179] Farris v. Hutchinson, 838 P.2d 374 (Mont. 1992).

[180] Mason v. Huntsville City Bd. of Educ., 591 So. 2d 860 (Ala. Civ. App. 1991).

[181] Board of Educ. of Community Sch. Dist. No. 29 of City Sch. Dist. of City of N.Y. v. Fernandez, 588 N.Y.S.2d 869 (App. Div. 1992).

[182] Greenhalgh v. City Council of City of Cranston, 603 A.2d 1090 (R.I. 1992).

Two cases dealt with probationary or seniority issues. A New York teacher was entitled to credit for two years regular substitute credit, thus limiting her probationary teaching to one year under a state statute that reduced the normal three years probationary period to one year, if the teacher had two years satisfactory service as a regular substitute.[187] The school district had tried to argue that the two years should not count because the teacher did not have an assignment the first six days of the probationary period until the district determined the need for teachers. This argument of a break between the two years substitute teaching and the probationary year was rejected outright by the court. "The tenure system must be construed broadly in favor of the teacher, and it is necessary to strictly police procedures to prevent corruption of the system by manipulation of the requirements for tenure."[188] A principal of a West Virginia high school for mentally retarded students was not subject to the terms of a state statute requiring that assignment of traditional summer school teaching positions were to be based on certification and seniority. Since the summer school provided to the mentally retarded students was necessary under IDEA to prevent regression, the summer school was not a traditional one and therefore the principal could base her decision on other factors. In this case, a teacher with more seniority in the district was not hired because he was not proficient in sign language to work with the summer school's deaf students.[189]

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[183] Porter v. Maine State Retirement Sys., 609 A.2d 1146 (Me. 1992).

[184] Adams v. Contributory Retirement Appeal Bd., 597 N.E.2d 1051 (Mass. Ct. App. 1992).

[185] Laurito v. Public Sch. Employees' Retirement Bd., 606 A.2d 609 (Pa. Commw. Ct. 1992).

[186] Chapel v. Board of Trustees of Pub. Employees' Retirement Sys., Div. of Pensions, 609 A.2d 1294 (N.J. 1992).

[187] Kransdorf v. Board of Educ. of Northport—East Northport Union Free Sch. Dist., 581 N.Y.S.2d 98 (App. Div. 1992).

[188] *Id.* at 99.

One case dealt with workers' compensation. An elementary physical education teacher diagnosed as being allergic to a wide variety of allergens was not entitled to workers compensation when the allergens could be found at home and in the environment generally, and not just at work.[190]

In a case involving West Virginia's Parental Leave Act, the Act has been interpreted to include teachers. Interpreting teachers to be employees of "any county board of education in the state," a teacher was entitled to a leave of absence for a period of twelve weeks to care for his newborn daughter.[191]

In a case involving a state salary scale, a local school board that had changed its salary schedule and had compensated its teachers for one year pursuant to a seven-step salary schedule, rather than the state ten-step schedule, was ordered in a mandamus action to pay as per the state schedule because payment for twenty-eight prior years pursuant to the state schedule amounted to acceptance of the state schedule.[192]

In an interesting case balancing a school board's authority to select between hiring an experienced teacher who had resigned years earlier to raise a family, and hiring young inexperienced teachers, the decision to hire inexperienced teachers was upheld in this case.[193] But the court added the caveat that "hiring must always be done on the basis of qualifications, and it is therefore inappropriate to hire new and inexperienced teachers over older, more experienced teachers simply because young personnel are cheaper for the board to hire. However, this general proposition should not discourage a board from hiring young teachers when they are the best qualified applicants."[194]

Tenure

Tenure Status

A wide variety of issues from a number of states were reported under this section. In Louisiana, teachers employed by a school board under a federally funded special education program could not count the years teaching under the program toward the acquisition of permanent tenure status.[195] Under New York law, an employee with tenure under one area cannot be assigned to a new tenure area during a time of financial exigency without the employee's knowledge of the new tenure area and of seniority rights.[196] Under Alabama law, a city school superintendent does not have continuing service status as a "supervisor."[197] Under state statute in Arkansas, a school teacher could be tenured only after three successive years of teaching in the same school district. A school teacher who had completed two years of teaching in one Arkansas school district and two years in another was still a probationary teacher.[198] A teacher tenured in the classification area of physical education/health was entitled to carry forward her tenure credits when the classification areas were later split and she was nonrenewed as the least senior member of the health area. While the school board can perform radical restructuring of its tenure areas, it can do so only prospectively.[199] A teacher who had established her entitlement to tenure and reinstatement with back pay and contributions to the retirement system was not entitled to prejudgment awards because a state agency (school district) in Kentucky, which has waived its sovereign immunity for purpose of a lawsuit, has not necessarily "waived its immunity from liability for payment of interest in such a suit."[200] In Minnesota, a superintendent who had acquired continuing contract rights to a 1.0 FTE superintendent position could not be placed on unrequested leave of absence and then be reassigned to a .5 superintendent and .5 FTE tenured secondary school principal. Because the superintendent had elected to continue his status under an older state law granting superintendents continuing contracts as a separate category rather than a new law combining teachers and superintendents, the superintendent could not be reinstated to a position less than his continuing contract status.[201] In a case of first impression, a federal district court determined that under state statute a person tenured as a principal in one county could not transfer that tenure to another county. As a result, the principal had no protectable property interest in her status as principal after pursuing employment in a different county.[202] In a narrow reading of its tenure statute, the Ohio Court of Appeals determined that a teacher hired under a one-year unconditional limited contract during the second year teaching in the district was not entitled to a continuing contract at the end of the second year because he had failed

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[189] Board of Educ. of County of Wood v. Enoch, 414 N.E.2d 630 (W. Va. 1992).
[190] Champion v. Beale, 833 S.W.2d 799 (Ky. 1992).
[191] Hudok v. Board of Educ. of Randolph County, 415 S.E.2d 897 (W. Va. 1992).
[192] Greene County Bd. of Educ. v. Durrett, 600 So. 2d 320 (Ala. Civ. App. 1992).
[193] Triggs v. Berkeley County Bd. of Educ., 420 S.E.2d 260 (W. Va. 1992).
[194] *Id.* at 270.
[195] Guillory v. Orleans Parish Sch. Bd., 597 So. 2d 96 (La. Ct. App. 1992).

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196. Kilmer v. Board of Educ. of City Sch. Dist. of Rochester, N.Y., 587 N.Y.S.2d 488 (Sup. Ct. 1992).
197. Mitchell v. Skinner, 603 So. 2d 1023 (Ala. 1992).
198. McGee v. Armorel Pub. Schs., 827 S.W.2d 137 (Ark. 1992).
199. Kulick v. Board of Educ. of Middle Country Cent. Sch. Dist. No. 11, 577 N.Y.S.2d 666 (App. Div. 1991).
200. Powell v. Board of Educ. of Harrodsburg, 829 S.W.2d 940, 941 (Ky. Ct. App. 1991).
201. Jurkovich v. Independent Sch. Dist. No. 708, Tower-Soudan, 478 N.W.2d 232 (Minn. Ct. App. 1991).
202. Lee-Warren v. School Bd. of Cumberland County, 792 F. Supp. 472 (W.D. Va. 1991).

to obtain his professional certificate and to file it with the school prior to issuance of the unconditional limited contract.[203]

Tenure by Default or Acquiescence

In Alabama, the years of teaching service under an emergency or provisional teaching certificate can be added to the years of teaching under a professional certificate for purposes of determining tenure. In this case, a teacher had acquired tenure and therefore could not be nonrenewed without following the statutory procedures.[204] A teacher's resignation, absent a showing of fraud, duress, or coercion, was effective when accepted by the school board, even if she had acquired tenure by estoppel during her teaching.[205]

Certification

Certification Standards

A variety of issues were raised in a number of different states. Where a school district hired teachers who were issued emergency credentials rather than hiring regularly credentialed teachers who were available, a California appeals court held that emergency credentialed teachers were deemed qualified to teach and that school districts had discretion in determining which teachers met their needs.[206] Tennessee offers teachers several levels of career certification depending on evaluations of three evaluators along with the school principal, fellow faculty members, and students. Teachers found to be outstanding receive salary supplements. A teacher who had sought a Career Level III certification, but who had only accumulated sufficient evaluation points for a Career Level I, lost in his claim to be awarded Career Level III because there was no evidence that the evaluators were biased or prejudiced, or that their opinions were not the result of objective, logical reasoning.[207] In New York, a tenured teacher certified to teach business education and driver and safety education, who had been inadvertently reassigned to teach in a subject matter area (secondary science) in which he was not certified, was entitled to pay during the suspension pending outcome of a disciplinary proceeding to remove the teacher from employment for lack of certification in the subject matter area.[208] An elementary teacher who sought to reinstate his Oregon teaching license, which he had allowed to lapse following his termination from employment, was improperly denied reinstatement under the Teacher Standards and Practices Commission's definition of "good moral character." Complete reliance by the Commission on hearsay evidence from investigative reports regarding the teacher's alleged sexual physical contacts with students failed to meet the substantial evidence test.[209] A superintendent who lacked state certification for that position at the time he signed his contract had a voidable contract which the school board could terminate. An important factual element of this case was that school board members had no knowledge that the superintendent's endorsement was lacking when the contract had been signed.[210]

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[203] State *ex rel.* Fraysier v. Bexley City Sch. Dist. Bd. of Educ., 583 N.E.2d 1000 (Ohio Ct. App. 1989).

[204] *Ex parte* Turner, 601 So. 2d 995 (Ala. 1992).

[205] Gould v. Board of Educ. of Sewanhaka Cent. High Sch. Dist., 584 N.Y.S.2d 910 (App. Div. 1992).

[206] California Teachers Ass'n v. Commission on Teacher Credentialing, 10 Cal. Rptr.2d 126 (Ct. App. 1992).

[207] Sallee v. State Bd. of Educ., 828 S.W.2d 742 (Tenn. Ct. App. 1992).

[208] Winter v. Board of Educ. for Rhinebeck Cent. Sch. Dist., 580 N.Y.S.2d 134 (N.Y. 1992).

Decertification, Revocation, or Suspension

An Ohio school board properly exercised its authority to revoke the teaching certificate of a teacher who had been convicted of receiving stolen property, a fourth degree felony, even though a referee had recommended that the certificate not be revoked because the crime had no relation to her duties as a teacher.[211] An Ohio appeals court upheld the State Board of Education's revocation of a teaching certificate of a teacher who had admitted in court to drug addiction and theft of drugs and money at a group home where she worked.[212]

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[209] Reguero v. Teacher Standards and Practices Comm'n, 822 P.2d 1171 (Or. 1991).

[210] Maasjo v. McLaughlin Sch. Dist. # 15-2, 489 N.W.2d 618 (S.D. 1992).

[211] Stelzer v. State Bd. of Educ., 595 N.E.2d 489 (Ohio Ct. App. 1991).

[212] Crumpler v. State Bd. of Educ., 594 N.E.2d 1071 (Ohio Ct. App. 1991).

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BARGAINING

Charles J. Russo

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Introduction

The number of reported opinions on collective bargaining and related labor issues declined even more sharply this year than last even though the number of states permitting bargaining continues to grow.[1] There were no Supreme Court rulings on bargaining and the reported cases generally applied established precedents to different factual settings. This chapter reviews disputes arising in the context of K-12 education; cases involving higher education are discussed in Chapter 7.

Constitutional Issues

As has been the case in recent years, the majority of rulings in this section involve disputes where fair share agreements occupy center stage. In fact, seven of the nine cases are concerned with fair share agreements; one case deals with bargaining in church-related schools; the final case examines free speech and a bargaining agreement.

Fair Share Agreements

The Ninth Circuit heard the only federal case involving fair share agreements. Ruling on behalf of the union, it reversed a grant of summary judgment[2] that had been entered in favor of nonunion teachers. A unanimous court held that the "opt out" procedures employed by the union to give dissenting nonmembers the opportunity to object to the payment of a full agency fee complied with the applicable constitutional safeguards, thereby ensuring sufficient protection of their First Amendment rights.[3] It further reasoned that the trial court erred in holding that the First Amendment requires additional affirmative consent to the payment of union dues by nonmembers before the full amount of dues could be deducted.

In the first of two Massachusetts' cases, the Supreme Judicial Court of Massachusetts affirmed the dismissal of a guidance counselor's challenge to the validity of agency fees demanded by her bargaining representative.[4] It refused to determine whether she had the same right under the applicable statute to speak and vote on the bargaining agreement as union members because she failed to raise the issue below. She did not dispute that she had adequate notice and an opportunity to vote on the proposed contract. In addition, the court upheld the dismissal of the counselor's allegation that the union breached its duty of fair representation; not only had she failed to raise the issue below, but even if she had done so it would have been time barred.

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[1] New Mexico recently became the 34th state to allow public school employees to bargain collectively. Karen Diegmueller, *Union Leaders Hail N.M. Collective-Bargaining Bill*, EDUCATION WEEK, March 18, 1992, at 19, 22.

[2] Mitchell v. Los Angeles Unified Sch. Dist., 744 F. Supp. 938 (C.D. Cal. 1990). *See* THE YEARBOOK OF EDUCATION LAW 1991 at 38 for a full discussion of this case.

[3] Mitchell v. Los Angeles Unified Sch. Dist., 963 F.2d 258 (9th Cir. 1992).

[4] McCormick v. Labor Relations Comm'n, 588 N.E.2d 1 (Mass. 1992).

Based in part on the rationale of the previous case, an appellate court in Massachusetts upheld the five-day suspension without pay of three nonunion teachers who refused to remit an agency service fee to their bargaining representative.[5] It conceded that the agency service fee in question was unlawful because it was the same amount as union dues and could not convincingly be ascribed to contract administration. However, the court affirmed the dismissal of their suit. It opined that by disregarding the procedures to challenge the agency fees, the teachers failed to press their claims in a timely fashion.

The Supreme Court of Wisconsin ruled on the propriety of union methods in calculating and collecting fair-share fees from dissenting nonmembers.[6] Relying primarily on *Lehnert v. Ferris Faculty Association*,[7] it upheld advertising related to bargaining or contract administration, lobbying expenses; and the cost of representing other bargaining units as properly chargeable, but struck down organizing costs. After finding that *Chicago Teachers Union, Local No. 1 v. Hudson*[8] applied retroactively, the court also decided that the fair-share fee procedure was constitutionally defective; it failed to provide an independent audit to determine whether the local union's percentage of nonchargeable expenses was less than that of the parent union. Finally, the court concluded that the Board of School Directors and County government did not commit an unfair labor practice by deducting and forwarding the dues to the union because in doing so they merely sought to comply with the provisions of the operative bargaining agreement.

An intermediate appellate court in California reversed a decision in favor of teachers who were not members of the union.[9] Ruling for the union, it found that the concurrent notice provisions of state regulations, which permitted the union simultaneously to collect agency fees from nonmembers, place them in an interest-bearing escrow account, and provide notice of their right to object to the use of funds for activities unrelated to bargaining, comported with the *Hudson*[10] guidelines. Thus, the court concluded that the First Amendment and due process rights of the dissenting nonunion member teachers were adequately protected.

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[5] Belhumeur v. Labor Relations Comm'n, 589 N.E.2d 352 (Mass. App. Ct. 1992). Although this is a new action, it is an extension of an ongoing difference of opinion between these teachers and the union. *See* THE YEARBOOK OF EDUCATION LAW 1992 at 38 for the earlier case.

[6] Browne v. Wisconsin Employment Relations Comm'n, 485 N.W.2d 376 (Wis. 1992).

[7] 111 S. Ct. 1950 (1991). *See* THE YEARBOOK OF EDUCATION LAW 1992 at 37 for a full discussion of this case.

[8] 475 U.S. 292 (1986). *See* THE YEARBOOK OF EDUCATION LAW 1987 at 46 for a full discussion of this case.

[9] Jerabek v. State Pub. Employment Relations Bd., 4 Cal. Rptr.2d 181 (Ct. App. 1991).

[10] *See* note 8 *supra*.

The two final cases involving fair share agreements both took place in Indiana. In a further review of a dispute over the calculation of fair share fees,[11] an appellate tribunal reversed in favor of the union.[12] It found that the union's proposed method of calculating the fees was proper since it included an adequate explanation of the basis for the charges, a reasonably prompt opportunity to take exception to the size of the fees before an impartial decision maker, and an escrow account for funds reasonably in dispute during the pendency of any challenge. It also held that the trial court erred in requiring chargeable expenses to be proven by clear and convincing evidence rather than by a mere preponderance of the evidence.

Dissenting nonmember teachers appealed a grant of summary judgment entered on behalf of the union in their dispute over a fair shares fee. An appellate court in Indiana reversed in favor of the teachers.[13] It reasoned that a union could not meet its burden of proving a nonunion member's fair share fee by a formula which subtracts nonchargeable expenses from its chargeable expenses. Rather, a union must affirmatively prove its expenses. Also, applying the standards set in *Lehnert v. Ferris*,[14] the court held that lobbying, political, charitable, public relations, and organizing expenses could not be charged to nonmembers; state and national affiliation expenses were chargeable only to the extent that the union could establish that benefits would ultimately enure to the members of the local.

First Amendment: Bargaining and Church-operated Schools

Subsequent to the reversal of the State Bureau of Mediation Services' (SBMS) decision to certify an exclusive bargaining representative for teachers, counselors, and librarians while excluding supervisors and teachers in the religion department of a Roman Catholic secondary school,[15] the teachers sought further review. The Supreme Court of Minnesota reversed in favor of the teachers.[16] It reasoned that since employees in church-operated institutions were not explicitly excluded from the terms of the Minnesota Labor Relations Act (MLRA), they must be regarded as covered by it. The court further ruled that because the duty imposed by the MLRA was to bargain over wages, hours, and working conditions, the Act passed constitutional muster under the tripartite *Lemon v. Kurtzman* test.[17] In addition, it opined that the MLRA did not violate the state's freedom of conscience clause which the court construed to afford even greater protection for religious liberties against governmental action than the First Amendment. Accordingly, the court held that where the valid subjects of negotiation are the purely secular conditions of employment, the SBMS properly asserted its jurisdiction.

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[11] Ft. Wayne Educ. Ass'n, Inc. v. Aldrich, 527 N.E.2d 201 (Ind. Ct. App. 1988). *See* The YEARBOOK OF EDUCATION LAW 1989 at 34 for a full discussion of this case.

[12] Ft. Wayne Educ. Ass'n, Inc. v. Aldrich, 585 N.E.2d 6 (Ind. Ct. App. 1992).

[13] Albro v. Indianapolis Educ. Ass'n, 585 N.E.2d 666 (Ind. Ct. App. 1992).

[14] *See* note 7 *supra*.

[15] Hill-Murray Fed'n of Teachers, St. Paul v. Hill-Murray High Sch., Maplewood, 471 N.W.2d 372 (Minn. Ct. App. 1991). *See* The YEARBOOK OF EDUCATION LAW 1992 at 39 for a full discussion of this case.

[16] Hill-Murray Fed'n of Teachers, St. Paul v. Hill-Murray High Sch., Maplewood, 487 N.W.2d 857 (Minn. 1992).

First Amendment: Freedom of Speech

The Third Circuit affirmed the dismissal of a teacher's allegation that she was removed from her coaching positions in violation of her First and Fourteenth Amendment rights.[18] It reasoned that where the teacher's comments, published in a faculty newsletter, did not relate to matters of public concern, the alleged retaliatory loss of her coaching positions violated neither her rights to freedom of speech nor association. The court also found that since the collective bargaining agreement did not give the teacher a procedural due process property interest in her coaching position, her allegation was properly dismissed for failure to state a claim.

Recognition and Representational Issues

There are two cases in this section. The first deals with unit determination and the second with union elections.

Unit Determination

The State Labor Relations Board along with the union representing school employees sought further review of a ruling which maintained that the secretary to a school district's business manager could be excluded from the bargaining unit. The Supreme Court of Rhode Island affirmed.[19] It reasoned that since the secretary had regular access to confidential information relating to labor negotiations, anticipated contracts, disciplinary matters, and employee grievances, she was a confidential employee who could properly be excluded from the bargaining unit.

Elections

The union representing school personnel filed suit over an order of the Illinois Educational Labor Relations Board (IELRB), which called for an election to determine whether the employees could sever their ties with the union. An appeals court dismissed in favor of the IELRB.[20] It found the appeal to be moot because the election had taken place and the bargaining unit decided not to end its relationship with the union. Thus, the union had no interest remaining in the resolution of the dispute.

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[17] 403 U.S. 602 (1971).

[18] Sanguigni v. Pittsburgh Bd. of Pub. Educ., 968 F.2d 393 (3d Cir. 1992).

[19] Barrington Sch. Comm. v. Rhode Island State Labor Relations Bd., 608 A.2d 1126 (R.I. 1992).

Rights and Obligations of Exclusive Bargaining Representatives

Both of the cases in this section address a union's duty of fair representation.

Obligations of Exclusive Representatives

In a federal case that took more than a year to reach the reporters, a probationary teacher whose employment had been terminated brought suit claiming that his union breached its duty of fair representation. His complaint was dismissed.[21] The court ruled that in the absence of any evidence that he had been subject to "harassment and intimidation," there was no basis on which the union could have been expected to file a Special Complaint on the teacher's behalf. Hence, because the union's decision was not arbitrary, discriminatory, or in bad faith, the teacher had no ground on which to allege that the union breached its duty of fair representation. His due process and equal protection claims were also rejected.

A union appealed a decision to permit a disgruntled teacher's claim that it breached its duty of fair representation to go forward. Judgment was reversed in favor of the union.[22] An appellate court in New York ruled that where a union has discretion with regard to filing a grievance, its mere failure to do so is not a per se violation of its duty of fair representation. Moreover, other than conclusory and self-serving affidavits of herself and her attorney, there was no evidence of bad faith, discrimination, or arbitrariness by the union.

Scope of Bargaining

There are four cases summarized in this section. The first three examine issues relating to mandatory subjects of bargaining; the fourth considers a prohibited topic.

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[20] Edwardsville Sch. Serv. Personnel Ass'n v. Illinois Educ. Labor Relations Bd., 600 N.E.2d 910 (Ill. App. Ct. 1992).

[21] Castro v. New York City Bd. of Educ., 777 F. Supp. 1113 (S.D.N.Y. 1990); *aff'd without written opinion*, 923 F.2d 844 (2d Cir. 1990).

[22] Mellon v. Benker, 588 N.Y.S.2d 482 (App. Div. 1992).

Mandatory Topics of Bargaining

In an ongoing controversy involving companion cases where a reduction-in-force plan was found to be a mandatory subject of bargaining but the same was not true about the development and implementation of teacher evaluation plans,[23] the unions representing teachers sought further review. Ruling in a case of first impression, the Supreme Court of Illinois reversed and remanded.[24] It held that the IELRB failed to apply the appropriate three-part test to determine whether a subject is mandatorily bargainable. Consequently, the IELRB was required to consider whether either disagreement involved wages, hours, and terms and conditions of employment; whether either concerned inherent managerial authority; and, if either involved both, how it could balance the conflicting interests to determine which interests were greater.

Where the state Employment Relations Board (ERB) and an intermediate appellate court[25] found class size to be a mandatory subject of bargaining, a school district sought further review. The Supreme Court of Oregon reversed in favor of the district.[26] It held that since class size was not one of the five subjects explicitly identified in the applicable statute as subject to mandatory bargaining, such a finding was premature. While expressing no opinion on whether the proposal dealt with a condition of employment, the court reasoned that in so far as the ERB failed to examine the specifics of the proposal and to determine whether it impacted upon other conditions of employment, it was an error to treat it as a mandatory subject of bargaining.

A school board sought further review after the State Employment Relations Board (SERB) and a trial court found that it had committed an unfair labor practice by refusing to bargain over its decision not to replace two retired teachers. An appeals court in Ohio affirmed.[27] It reasoned that since there was substantial evidence to support the finding that the board's refusal to bargain affected the terms and conditions of employment of teachers remaining in the bargaining unit, its intransigence constituted an unfair labor practice.

Prohibited Topics of Bargaining

The union representing teachers in overseas schools for the children of active duty American military personnel petitioned for further review of a determination by the Federal Labor Relations Authority that one of their bargaining proposals was nonnegotiable. The Second Circuit denied the petition.[28] It held that where the proposal, over the time at which an open house for parents should take place, interfered excessively with the statutorily reserved prerogative of management to assign work, it was properly found not to be subject to bargaining.

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[23] Central City Educ. Ass'n v. Illinois Educ. Labor Relations Bd., 557 N.E.2d 418 (Ill. App. Ct. 1990). *See* THE YEARBOOK OF EDUCATION LAW 1991 at 43 for a full discussion of this controversy.

[24] Central City Educ. Ass'n v. Illinois Educ. Labor Relations Bd., 599 N.E.2d 892 (Ill. 1992).

[25] Tualatin Valley Bargaining Council v. Tigard Sch. Dist. 23J, 808 P.2d 101 (Or. Ct. App. 1991). *See* THE YEARBOOK OF EDUCATION LAW at 44 for a full discussion of this case.

[26] Tualatin Valley Bargaining Council v. Tigard Sch. Dist. 23J, 840 P.2d 657 (Or. 1992).

[27] Eaton City Sch. Dist. Bd. of Educ. v. State Employment Relations Bd., 595 N.E.2d 432 (Ohio Ct. App. 1991).

Grievability and Arbitrability

Consistent with the trend in recent years, this is the lengthiest section of the Chapter. Once again, cases are discussed under "Presumption and Arbitrability" where the courts considered whether the underlying dispute was within the scope of the collective bargaining agreement or where it was necessary to interpret public policy as it related to arbitration. Decisions are presented under "Who Determines" rather than "Judicial Review" where, regardless of the underlying issue, the courts decided the jurisdictional issue of the appropriate forum within which the disagreement should be resolved. Opinions reviewed under "Procedural Issues" and "Managerial Prerogatives as a Bar" speak for themselves.

Presumption and Arbitrability

All but the final four of the twenty cases in this subsection uphold the general judicial presumption favoring arbitration as the means of resolving disputes over the meaning of collective bargaining agreements.

A school board sought further review of the denial of its application to vacate an arbitration award which ordered it to pay additional severance pay to the estate of a former teacher. An appeals court in Connecticut upheld the award.[29] It reasoned that since the parties consented to arbitration, framed the issues submitted, and clearly intended for the arbitrator to fashion an appropriate remedy, the trial court properly denied the motion to vacate the award.

The first of five consecutive cases from New York involved a suit where the New York State Court of Appeals was asked to review a ruling which upheld a stay of arbitration in a dispute over whether a school district could unilaterally alter the composition of a class.[30] Judgment was reversed in favor of the union.[31] The court held that since the bargaining agreement provided for arbitration of any dispute concerning the proper interpretation of the contract, it was an error to grant a stay. It also found that it was premature to conclude that arbitration over the make-up of a class was precluded by public policy where it was possible that an arbitrator would fashion a remedy narrow enough to cover only procedural guarantees.

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[28] Overseas Educ. Ass'n, Inc. v. Federal Labor Relations Auth., 961 F.2d 36 (2d Cir. 1992).

[29] Board of Educ. of the City of Hartford v. Hartford Fed'n of Sch. Secretaries, 600 A.2d 1053 (Conn. App. Ct. 1992).

[30] Babylon Union Free Sch. Dist. v. Babylon Teachers Ass'n, 563 N.Y.S.2d 453 (App. Div. 1990). *See* THE YEARBOOK OF EDUCATION LAW 1992 at 53 for a full discussion of this case.

[31] Babylon Union Free Sch. Dist. v. Babylon Teachers Ass'n, 579 N.Y.S.2d 629 (N.Y. 1991).

A teachers' union successfully appealed a stay of arbitration in a dispute over an alleged violation of the seniority, layoff, and dismissal provisions of its bargaining agreement.[32] An appellate tribunal in New York found that the matter was clearly arbitrable within the meaning of the contract. Thus, it rejected the school district's claims that the arbitrator might exceed his powers or render an award violative of public policy.

The union representing two teachers appealed a stay of arbitration in favor of a school district over its decision to deny an additional year of probationary status to two teachers who had been denied tenure. An appeals court reversed in favor of the union and ordered arbitration.[33] It reasoned that where the arbitration demand was not over the denial of tenure, but over the school board's alleged violations of the procedural evaluation provisions from which the tenure decision evolved, it was subject to arbitration.

After a school district participated in arbitration over whether it violated the terms of its collective bargaining agreement and its accompanying lunch duty side memorandum, it proceeded to have the award vacated. On further review judgment was reversed in favor of the union.[34] An appeals court held that by failing to seek a stay and by taking part in arbitration the district waived any claim that the side memorandum was not arbitrable.

In the final New York case, a school district unsuccessfully sought a stay of arbitration in a disagreement over whether it had wrongfully induced a teacher to sign a retirement agreement.[35] An appellate court concluded that since the retirement agreement between the teacher and the district was intended only as a limited modification of the collective bargaining agreement, the arbitration provisions of the contract were preserved.

A school district appealed an order that a dispute over the transfer of a school media specialist was within the parameters of the operative collective bargaining agreement and subject to arbitration.[36] The Supreme

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[32] Marcellus Cent. Sch. Dist. v. Marcellus Sch. Office Personnel Ass'n, 577 N.Y.S.2d 981 (App. Div. 1991).

[33] South Country Cent. Sch. Dist. v. Bellport Teachers Ass'n, 585 N.Y.S.2d 493 (App. Div. 1992).

[34] Frankfort-Schuyler Cent. Sch. Dist. v. Sarafin, 581 N.Y.S.2d 960 (App. Div. 1992).

[35] *In re* Cleveland, 585 N.Y.S.2d 555 (App. Div. 1992).

[36] Shorey v. Jefferson County Sch. Dist. R-1, 807 P.2d 1181 (Colo. Ct. App. 1990). *See* The Yearbook of Education Law 1992 at 49 for a full discussion of this case.

Court of Colorado affirmed.[37] It held that where the bargaining contract clearly evidenced an intent for matters such as this to proceed to arbitration, there was no reason for judicial interference. The court also found that as an intended third party beneficiary of the bargaining agreement between the union and the school district, the media specialist had standing to sue for breach of contract. However, it stayed any further action on this claim pending the exhaustion of remedies rule applicable to the grievance process.

A school district in Illinois sought further review of a decision by the IELRB that it had committed an unfair labor practice in dismissing a teacher from his extracurricular position as the head basketball coach at the high school. An appeals court affirmed in part and reversed in part.[38] It agreed that it was within the arbitrator's authority to determine that the district failed to provide due process consistent with the terms of the bargaining agreement before removing the teacher from his coaching position. However, it reversed the finding that the coach could not be dismissed but for "just cause." The court held that because the district had expressly refused the union's request to include a "just cause" clause in the collective bargaining agreement, the arbitrator acted beyond the scope of his authority in reading one into the contract.

Six teachers and a school social worker appealed a judgment which upheld an arbitrator's finding that their salaries could be frozen in order to correct salary overpayments. An appellate court in Michigan affirmed.[39] It reasoned that the arbitrator did not exceed his authority and was within the parameters of the master contract in freezing the salaries after the plaintiffs had been credited with more experience than they were entitled to under the collective bargaining agreement.

The union representing teachers in New Jersey appealed from a ruling which vacated an arbitration award in favor of a tenured teacher who did not receive a timely written evaluation consistent with the terms of the collective bargaining agreement. Judgment was reversed in favor of the union.[40] In reinstating the award the court found that the arbitrator's remedy, to expunge and destroy the disputed evaluation report, neither substantially interfered with the school administration's managerial prerogative nor violated any statutory policies.

Similarly, the union representing a teacher whose contract was not renewed appealed a ruling that vacated an arbitration award which ordered her to be given a continuing contract. The school district had failed to follow proper procedures in performing the evaluations that led

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37. Jefferson County Sch. Dist. No. R-1 v. Shorey, 826 P.2d 830 (Colo. 1992).
38. Board of Educ. of Harrisburg Community Unit Sch. Dist. No. 3 v. Illinois Educ. Labor Relations Bd., 591 N.E.2d 85 (Ill. App. Ct. 1992).
39. Martin v. East Lansing Sch. Dist., 483 N.W.2d 656 (Mich. Ct. App. 1992).
40. Lacey Township Bd. of Educ. v. Lacey Township Educ. Ass'n, 613 A.2d 1167 (N.J. Super. Ct. App. Div. 1991).

to the teacher's nonrenewal. Judgment was reversed and the award was reinstated.[41] An appeals court in Ohio found that where the evaluation procedures were part of the contract, the award properly drew its essence from the collective bargaining agreement.

In a second Ohio case, a school district appealed a ruling which ordered arbitration of a dispute over bus routes and the work hours of some bus drivers. The school board maintained that a change in routes was nonarbitrable; the union representing the drivers contended that it was challenging the arbitrable issue of the elimination of work hours, not the changes in the routes. An appellate court affirmed in favor of the union.[42] It held that since the provision in the collective bargaining agreement was subject to more than one reasonable interpretation it was properly subject to arbitration.

In an Ohio case that took two years to reach the reporters, the union representing teachers appealed a ruling which reversed a determination in its favor by the SERB. The trial court reasoned that a school district's refusal to bargain over the effects of the purchase of liability insurance was not an unfair labor practice in so far as it did not impact upon wages or terms and conditions of employment. Judgment was reversed in favor of the union.[43] The appellate tribunal concluded that the lower court failed to apply the proper standard in reviewing the SERB's determination by not according it due deference where there was substantial evidence to support its finding.

A school district in Pennsylvania appealed from an arbitration award ordering it to place a teacher into a position for which he had applied but had been denied a voluntary transfer. Judgment in favor of the teacher was affirmed.[44] The court ruled that because the terms of the collective bargaining contract gave preference to members of the bargaining unit when a vacancy occurred, and because the teacher was qualified for the position, the award was correctly drawn from the essence of the agreement.

In the first of two Minnesota cases, a tenured teacher who was returned to classroom duty after his position as coordinator of elementary school mathematics was discontinued due to financial limitations sought to use his tenure rights to "bump" into another administrative position. The school board rejected the findings of a hearing examiner who found in favor of the teacher. An appeals court affirmed in favor of the district.[45] It held that while the teacher was entitled to a hearing upon his demotion, neither the school board nor the hearing examiner had the right to determine whether he was entitled to the second position. The court concluded that under the terms of the operative collective bargaining agreement only an arbitrator had the authority to decide whether the teacher was entitled to reassignment in the other administrative role.

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[41] Waterloo Local Sch. Dist. Bd. of Educ. v. Waterloo Educ. Ass'n, 591 N.E.2d 1329 (Ohio Ct. App. 1990).

[42] Union-Scioto Local Sch. Dist. Bd. of Educ. v. Unioto Support Ass'n, 603 N.E.2d 375 (Ohio Ct. App. 1992).

[43] Willard City Sch. Dist. Bd. of Educ. v. State Employment Relations Bd., 583 N.E.2d 1009 (Ohio Ct. App. 1989).

[44] Greater Latrobe Area Sch. Dist. v. Pennsylvania State Educ. Ass'n, 615 A.2d 999 (Pa. Commw. Ct. 1992).

Where a school district's decision to subcontract its food service operation resulted in the loss of jobs for five food service employees, it sought further review of a ruling that the disagreement should be submitted to binding arbitration.[46] An appellate court in Minnesota once again affirmed in favor of arbitration.[47] It found that where the bargaining agreement remained in effect, the district's action was properly subject to arbitration as a term and condition of employment.

In the first of four cases where courts ruled against arbitration, a school district in Pennsylvania appealed from an order which granted a union's motion to quash an application vacating arbitration in a disagreement over job responsibilities. The district transferred duties formerly assigned to the Athletic Director, a part time position filled by a teacher, and added them to the job of a full time Assistant Principal for Student and Supplemental Activities. Judgment was reversed in favor of the district.[48] The court held that since collective bargaining agreements do not apply to supplemental contracts the issue was not arbitrable. Moreover, it ruled that because the teacher who served as Athletic Director was not acting in his capacity as a professional employee, he was precluded from seeking arbitration. The final three cases here were litigated in New York. The union representing teachers in an annexed central school district appealed a stay of arbitration where the teachers attempted to have the annexing district continue the contractual benefits they claimed that they were due under the terms of their collective bargaining agreement. Judgment staying arbitration was affirmed.[49] An appeals court held that since the bargaining agreement expired upon the annexation of their district and the new district was not obligated to honor it, the teachers were not entitled to arbitration.

The union representing a teacher who was transferred unsuccessfully petitioned for arbitration.[50] The court held that where the statute permitting a school superintendent to transfer a teacher was not modified by a collective bargaining agreement, the resulting dispute was not subject to arbitration. However, it also ruled that the teacher's claim that he had been transferred because of past union activities was arbitrable.

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[45] *In re* Dillenberger, 486 N.W.2d 17 (Minn. Ct. App. 1992).

[46] School Serv. Employees Local Union No. 284 v. Independent Sch. Dist. No. 88, 459 N.W.2d 336 (Minn. Ct. App. 1990). *See* The Yearbook of Education Law 1991 at 47 for a full discussion of this case.

[47] Independent Sch. Dist. No. 88, New Ulm, Minn. v. School Serv. Employees Union Local 284, 490 N.W.2d 431 (Minn. Ct. App. 1992).

[48] Harbor Creek Sch. Dist. v. Harbor Creek Educ. Ass'n, 606 A.2d 666 (Pa. Commw. Ct. 1992).

[49] *In re* Cuba-Rushford Cent. Sch. Dist., 585 N.Y.S.2d 913 (App. Div. 1992).

[50] *In re* Steuben-Allegany Bd. of Coop. Educ. Servs., 581 N.Y.S.2d 973 (Sup. Ct. 1990).

A board of education in New York State successfully moved to stay arbitration over whether it could be compelled to reinstate the practice of paying salaries so that the first check of the school year included monies for services not yet rendered.[51] The court ruled that since the practice of advanced payments was contrary to both law and public policy, there was no reason to compel arbitration only to have it subsequently vacated as an act prohibited by law.

Who Determines

The first four of the six cases in this subsection took place in Ohio. After a partial strike by school personnel was found to be unauthorized by the SERB, a trial court dismissed an appeal by the school board on the ground that it lacked jurisdiction. An intermediate appellate court reversed. On further review the Supreme Court of Ohio affirmed.[52] It held that a finding by the SERB that a strike was unauthorized is an adjudication within the meaning of the state's Administrative Procedure Act. Thus, on appeal it was subject to the jurisdiction of the trial court.

In a case that took two years to reach the reporters, the SERB dismissed teachers' claims that their union breached its duty of fair representation. A trial court also dismissed on the ground that it lacked subject matter jurisdiction. On further review an appellate court in Ohio affirmed the dismissals.[53] It held that the teachers had no right of appeal where the SERB found no probable cause to issue a complaint. It concluded that a right of appeal does not exist until a complaint has been issued and a formal hearing on the merits has been conducted by the SERB.

Similarly, where the SERB recommended the dismissal of an unfair labor practice charge brought by the union representing employees of a Board of Mental Retardation and Developmental Disabilities over the Board's unilateral institution of a time clock and sign in procedure, a trial court refused to act on the ground that it lacked subject matter jurisdiction. An appellate tribunal in Ohio affirmed.[54] It held that since the SERB's decision to forego prosecuting a complaint was not made pursuant to a quasi-judicial proceeding, there was no right of appeal.

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[51] Board of Educ. of the Ramapo Cent. Sch. Dist. v. Ramapo Teachers' Ass'n. 586 N.Y.S.2d 852 (Sup. Ct. 1992).

[52] Groveport-Madison Local Educ. Ass'n, OEA/NEA v. State Employment Relations Bd., 584 N.E.2d 700 (Ohio 1992).

[53] Gunn v. Euclid Teachers' Ass'n, 583 N.E.2d 1324 (Ohio Ct. App. 1989).

[54] Ohio Ass'n of Pub. Sch. Employees/AFSCME, AFL-CIO v. Lorain County Bd. of Mental Retardation and Developmental Disabilities, 593 N.E.2d 452 (Ohio Ct. App. 1991).

After the SERB dismissed unfair labor practice charges brought by teachers who alleged that the school district unilaterally implemented cut backs in violation of their collective bargaining agreement, they filed federal civil rights claims. A state trial court dismissed for lack of subject matter jurisdiction. An appeals court in Ohio reversed and reinstated the action.[55] It ruled that absent explicit federal statutory directives, the trial court presumptively had concurrent jurisdiction over the federal claims. It further reasoned that although the teachers' unfair labor practice charges were subject to the jurisdiction of the SERB, the trial court was not precluded from asserting jurisdiction due to the alleged civil rights violations.

A school district appealed the IELRB's dismissal of its unfair labor practices charge against a teacher and her union for refusing to bargain in good faith after she filed suit rather than submit to arbitration. An appellate court in Illinois affirmed.[56] It ruled that where the matter was properly before the jurisdiction of the court due to the absence of any errors in the service of the petition for administrative review, the teacher could not be subjected to an unfair labor practices charge. Also, it affirmed the IELRB's dismissal of the charge against the teacher, in so far as she was neither an agent nor a representative of her union, and against the union since it was not a party to her action.

Where a school committee obtained an injunction ordering its teachers to end their strike, the court subsequently adjudged some union members in contempt. However, when the court ordered the committee to reinstate and comply with the terms of the expired collective bargaining agreement it had entered into with the union representing its teachers, the committee sought a stay. The Supreme Court of Rhode Island granted the stay.[57] Ruling solely on the sanctions that could be imposed on striking members, it reasoned that the trial court had the power to enjoin an illegal strike. However, it held that the lower court lacked subject matter jurisdiction to determine what, if any, agreement was in force between the parties. Accordingly, the court concluded that only the State Labor Relations Board had the jurisdiction to determine which contract was in effect between the parties.

Procedural Issues

While procedural issues are usually not dispositive of the underlying controversy, they can have a significant impact on the outcome of an arbitration hearing. The six cases in this section examine a variety of issues dealing in whole or in part with procedure.

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[55] Weinfurtner v. Nelsonville-York Sch. Dist. Bd. of Educ., 602 N.E.2d 318 (Ohio Ct. App. 1991).

[56] Board of Educ. of Rochester Community Unit Sch. Dist. No. 3A v. Illinois Educ. Labor Relations Bd., 592 N.E.2d 675 (Ill. App. Ct. 1992).

[57] Warwick Sch. Comm. v. Warwick Teachers Union, 613 A.2d 1273 (R.I. 1992).

A tenured teacher whose employment was terminated without good cause was reinstated by the county superintendent. When he also sought arbitration to enforce the award, the school district unsuccessfully sought an injunction to compel the teacher and his union to elect the forum within which they would pursue his claims. The district did not appeal the denial of its injunction but did seek further review of the teacher's motion for summary judgment, which ordered specific performance of the arbitration provisions of their collective bargaining agreement. The Supreme Court of Montana affirmed.[58] It held that by not appealing the denial of its injunction the district was not only bound to participate in arbitration but was also collaterally estopped from claiming that it was forced to proceed in two forums.

Where a teacher's aid who was cleared of wrong doing after being charged with fondling a female student was denied attorney fees arising out of the resulting arbitration proceedings, he sought further review. An appeals court in Washington affirmed.[59] It reasoned that arbitration was an action within the meaning of the statute permitting reasonable attorney fees to be awarded to a successful party. However, it also held that the aid's right to recovery had been waived by a provision in his collective bargaining agreement which stated that any costs associated with arbitration were to be shared equally by the school district and union and that all other expenses were to be borne by the party incurring them.

Where a SERB found probable cause to believe that a school board committed an unfair labor practice in adopting a policy prohibiting smoking in any district building, the union representing school employees obtained an order requiring a hearing. An appeals court in Ohio affirmed.[60]

The Pennsylvania Labor Relations Board (PLRB) found that a school district committed an unfair labor practice by soliciting bids for the subcontracting of busing services after contract negotiations with the union representing drivers, aides, and mechanics broke down. Thus, it ordered the subcontract rescinded and the employees reinstated. A trial court dismissed an appeal by the district on the ground that the PLRB's order was supported by substantial evidence. Judgment in favor of the PLRB was affirmed.[61] An appeals court ruled that while the district's filing of a petition for an appeal operated as an automatic *supersedeas*, it would vacate the same. It reasoned that since the district had already been under the obligation to comply with a final PLRB order, failure to vacate the *supersedeas* would have caused irreparable harm to the PLRB, the union, and the public interest.

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[58] Colstrip Faculty Ass'n, MEA/NEA v. Trustees, Rosebud County Elementary Sch. Dist. No. 19, 824 P.2d 1008 (Mont. 1992).

[59] Hitter v. Bellevue Sch. Dist., 832 P.2d 130 (Wash. Ct. App. 1992).

[60] Ohio Ass'n of Pub. Sch. Employees Chapter 177 AFSCME, AFL-CIO v. Forest Hills Local Sch. Dist. Bd. of Educ., 598 N.E.2d 200 (Ohio Ct. App. 1992).

[61] Elizabeth Forward Sch. Dist. v. Pennsylvania Labor Relations Bd. and AFSCME, AFL-CIO, 613 A.2d 68 (Pa. Commw. Ct. 1992).

A school board in Illinois appealed a determination by the IELRB that it was deemed to have admitted the allegations in an unfair labor practices complaint because of its failure to timely file an answer. Judgment was affirmed in favor of the IELRB.[62] The court held that the great pressure on the district's lead attorney due to a tragic family situation was not good cause for failing to satisfy the procedural requirement of responding to the complaint in a timely fashion.

A teacher on involuntary leave of absence for mental health reasons sought further review of a school board's refusal to grant his request for a hearing. An appeals court in New York affirmed.[63] It reasoned that since the teacher failed to exhaust the administrative remedy of medical arbitration as required by his collective bargaining agreement, he was not entitled to an adversarial hearing.

Management Prerogatives as a Bar

As strong as the judicial presumption favoring arbitration is, disputes involving nondelegable responsibilities are typically found to be beyond the scope of bargaining and arbitration. The first case in this subsection examines the inability of an arbitrator to order a grade change; the second deals with the transfer of a teacher.

Rather than follow statutory guidelines by filing an appeal from a school committee's decision to change a student's grade with the State Commissioner, the union representing the aggrieved teacher referred the matter to an arbitrator pursuant to their collective bargaining agreement. The school committee was granted a motion for declaratory judgment prohibiting arbitration and the union appealed. The Supreme Court of Rhode Island affirmed.[64] It held that where the legislature intended collective bargaining to be limited to terms of employment, an arbitrator lacked the statutory authority to act. Thus, the controversy was nonarbitrable.

An arbitrator ordered a kindergarten teacher who was involuntarily transferred to first grade to be returned to her former position in the following school year. A trial court vacated in favor of the school district and the union representing the teacher sought further review. An appellate court in New York affirmed.[65] It ruled that where the arbitration award impermissibly impacted upon the district's nondelegable responsibility to maintain adequate standards in the classroom, it was subject to neither collective bargaining nor to arbitration.

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[62] Board of Educ. of Thornton Township High Sch. Dist. No. 205 v. Illinois Educ. Labor Relations Bd., 600 N.E.2d 1313 (Ill. App. Ct. 1992).

[63] Levine v. Board of Educ. of the City of N.Y., 589 N.Y.S.2d 181 (App. Div. 1992).

[64] Pawtucket Sch. Comm. v Pawtucket Teachers Alliance, 610 A.2d 1104 (R.I. 1992).

[65] Board of Educ. of the Greenburgh Cent. Sch. Dist. No. 7 v. Greenburgh Teachers Fed'n, 586 N.Y.S.2d 11 (App. Div. 1992).

Judicial Review

As deferential as the courts may be to arbitration, a significant number of disagreements over collective bargaining, arbitration awards, and employment relations board rulings are subject to judicial review. The cases in this section are grouped under four categories: salary and benefits; leave of absence; lay off and dismissal; and reinstatement.

Salary and Benefits

Where a trial court construed the ambiguous phrase "extra class" in a negotiated teachers' contract to mean that high school teachers who ordinarily taught five class periods a day were entitled to additional compensation for teaching a sixth, the school district appealed. The Supreme Court of North Dakota affirmed.[66] It reasoned that since over the previous fifteen years teachers who taught an "extra class" received additional salary, the lower court properly interpreted the ambiguous term by placing the same meaning upon the words of the contract as the parties themselves had given to them.

Teachers employed by a special education cooperative unsuccessfully filed suit after a superintendent rescinded a principal's interim disposition of a salary grievance in their favor. An appeals court in Indiana affirmed.[67] It found that while the teachers were housed in a school district which had a salary schedule based on a contract of 183 work days, they actually served in a district where the collective bargaining agreement was based on 180 teacher contract days. The court held that where the principal lacked the authority to resolve the grievance by placing the teachers on the higher salary schedule, prorating their salaries based on the 180-day year of the contract in the district within which they taught did not breach the agreement between members of cooperative. Thus, the teachers were not entitled to seek claims as third party beneficiaries.

A school district sought further review after a teachers' union successfully brought suit to permit retired teachers to purchase optional insurance. The Supreme Court of Rhode Island affirmed summarily.[68] It held that the lower court correctly interpreted the terms of the collective bargaining agreement between the parties to permit qualified retired teachers to purchase additional insurance subsequent to retirement as a benefit of employment.

Leave of Absence

Where a school district refused to comply with an order that it substitute paid leave an employee had accumulated for unpaid leave he took under the state's Family and Medical Leave Act when he requested a five-day absence to help his family adjust to the arrival of their newly adopted son, it sought further review. Judgment was affirmed in favor of the employee.[69] An appeals court in Wisconsin ruled that the terms of the collective bargaining agreement which provided reimbursable leave for school employees did not conflict with the terms of the state law since the contract did not expressly prohibit expansion of the circumstances under which the leave could be used. Also, it found that the employee was entitled to reasonable attorney fees in connection with the litigation of his claims.

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[66] Williston Educ. Ass'n v. Williston Pub. Sch. Dist. No. 1, 483 N.W.2d 567 (N.D. 1992).

[67] Prairie Heights Educ. v. Board of Sch. Trustees of Prairie Heights Community Sch. Corp., 585 N.E.2d 289 (Ind. Ct. App.1992).

[68] Coventry Teachers Alliance Local 1075 v. Coventry Sch. Comm., 599 A.2d 1025 (R.I. 1991).

Lay Off and Dismissal

A tenured avionics teacher who was notified in July that he was being laid off rather than terminated when his program was discontinued, unsuccessfully brought suit alleging that the school district unlawfully terminated his employment. An appeals court in Kansas affirmed in favor of the district.[70] It reasoned that under the operative collective bargaining agreement the teacher's layoff was not subject to the statutory procedural protections for termination or nonrenewals. Thus, it was sufficient that he was given thirty days notice of his layoff, and he was not entitled to the notification by April 10 as required by state law for individuals whose employment were terminated.

After a school superintendent upheld the dismissal of a school bus driver based upon complaints alleging that he displayed inappropriate conduct in supervising and disciplining the students on his bus, the driver brought suit seeking reinstatement. An appeals court in New York confirmed the superintendent's determination.[71] It held that since the terms of the collective bargaining agreement did not give the driver a due process property interest in having a full evidentiary hearing before he could be discharged, and since there was evidence supporting the charges against him, his employment was properly terminated.

A teacher unsuccessfully brought suit against a board of education when his supplemental coaching contracts in basketball and track were not renewed after he was dismissed as a football coach for making a derogatory racial remark. Summary judgment in favor of the district was affirmed.[72] An appeals court in Ohio concluded that under the unambiguous terms of both his collective bargaining agreement and his supplemental contracts not only were his coaching duties automatically terminated upon the completion of his assigned tasks, he also was not entitled to any notice of nonrenewal.

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[69] Richland Sch. Dist. v. Department of Indus., Labor and Human Relations, Equal Rights Div., 479 N.W.2d 579 (Wis. Ct. App. 1991).

[70] Thompson v. Unified Sch. Dist. No. 259, Wichita, 819 P.2d 1236 (Kan. Ct. App. 1991).

[71] Robbins v. Malone Cent. Sch. Dist., 581 N.Y.S.2d 493 (App. Div. 1992).

[72] Holthaus v. Cincinnati Bd. of Educ., 602 N.E.2d 360 (Ohio Ct. App. 1991).

In the only federal case in this subsection, two teachers (one tenured and one nontenured) brought suit against the board of education and various school administrators alleging that they were forced to leave their positions following special evaluations that were performed pursuant to the collective bargaining agreement.[73] The court dismissed that part of the action wherein the nontenured teacher failed to allege sufficient facts to allow the court to conclude that the district breached the collective bargaining agreement by subjecting her to a special evaluation. However, it held that where there was a genuine issue of material fact over the circumstances under which the tenured teacher left his position, summary judgment in favor of the board was precluded.

Reinstatement

School bus drivers who had been discharged but subsequently reinstated by a school board due to felony convictions on their records sought further review of their terminations.[74] The Sixth Circuit affirmed in part and reversed in part.[75] It upheld the finding that because the collective bargaining agreement failed to meet the requirements of state law, its grievance and arbitration provisions were not the drivers' exclusive remedies. However, it reversed the denial of the drivers' procedural due process claims and remanded with the order that they be given post-termination review of their discharges. Finally, it ruled that although the drivers had yet to prevail on their assertions that they had been discharged without cause, they had established that they were terminated without procedural due process, thereby entitling them to attorney fees.

The IELRB unsuccessfully sought enforcement of its order that a school district reinstate a football coach, who it found had been wrongfully terminated in violation of the operative collective bargaining agreement, for a period to include actual hands-on coaching. An appeals court in Illinois affirmed in favor of the district.[76] It reasoned that the district made a *bona fide* offer to reinstate the coach after the football season had ended. The court concluded that neither the arbitrator's award nor the hearing officer's decision specified that he had to be given another opportunity for hands-on coaching; they merely required that he be reinstated for the coming season and be given back pay.

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[73] Harris v. Board of Educ. of Columbus, Ohio, City Sch. Dist., 798 F. Supp. 1331 (S.D. Ohio 1992).

[74] Sutton v. Cleveland Bd. of Educ., 726 F. Supp. 657 (N.D. Ohio 1989). *See* THE YEARBOOK OF EDUCATION LAW at 58 for a full discussion of this case.

[75] Sutton v. Cleveland Bd. of Educ., 958 F.2d 1339 (6th Cir. 1992).

[76] People *ex rel.* Illinois Educ. Labor Relations Bd. v. Oregon Community Unit Sch. Dist. 220, 599 N.E.2d 95 (Ill. App. Ct. 1992).

Impasse and Fact Finding

A school board appealed a ruling that it committed an unfair labor practice by mailing its bargaining unit employees a report on the status of contract negotiations after a declaration of impasse. Judgment in favor of the union was affirmed.[77] An appeals court in Ohio held that even though the report was accurate and there was no evidence that the board sought to undermine the union, to invite direct bargaining, or to elicit a response, it was a clear violation of the statute prohibiting such a practice.

Strikes and Sanctions

A suit brought by a property owner charging a school district with misapplication of public funds by hiring substitute teachers in violation of a statute prohibiting employers from retaining professional strike breakers was dismissed for failure to allege facts sufficient to constitute a claim for relief. An appeals court in Oregon affirmed.[78] It held that since school districts were not employers within the meaning of the law, the action was properly dismissed.

Miscellaneous Decisions

A teacher's union sought further review of a summary judgment which prevented it from enforcing a term in its collective bargaining agreement requiring the school district to carry its mail to teachers without payment of postage through the district's in-house delivery system.[79] The Seventh Circuit affirmed.[80] It reasoned that since most of the union's communications cannot be considered to be those of the district nor on behalf of it, they cannot be treated as agents of the school corporation entitled to the "letters of the carrier" exception under federal law. However, it reversed and remanded on the limited issue of whether joint committees established pursuant to the bargaining agreement to administer programs such as excess leave may be entitled to the exception.

Conclusion

Although the number of reported cases on bargaining declined in 1992, there is no reason to expect this to be representative of a long term trend. In fact, given the strong presence of bargaining in the schools coupled with its ongoing growth and expansion, a steady supply of new, if unspectacular, cases can be expected to continue for the foreseeable future.

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[77] Mentor Exempted Village Sch. Dist. Bd. of Educ. v. State Employment Relations Bd., 602 N.E.2d 374 (Ohio Ct. App. 1991).

[78] Sullivan v. Kizer, 839 P.2d 227 (Or. Ct. App. 1992).

[79] Fort Wayne Community Sch. v. Fort Wayne Educ. Ass'n, Inc., 742 F. Supp. 1031 (N.D. Ind. 1990). *See* THE YEARBOOK OF EDUCATION LAW 1991 at 63 for the history of this case.

[80] Fort Wayne Community Sch. v. Fort Wayne Educ. Ass'n, Inc., 977 F.2d 358 (7th Cir. 1992).

Moreover, as the American economy appears to be in the midst of a recovery, it will be interesting to observe whether concessions that unions may have made to preserve jobs and to keep labor peace will have sown the seeds for labor discontent. Thus, the labor scene will be one of many educational venues worthy of continued scrutiny.

3

PUPILS

Henry S. Lufler, Jr.

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Introduction

United States Supreme Court decisions in cases concerning prayers at high school commencements and the standards of review to be used by courts in deciding if schools had reached unitary status, thereby removing them from court supervised desegregation plans, were recorded in 1992. The desegregation decision was particularly important because conflicting conclusions on the judicial standards to be used in ending major desegregation disputes had been reached by federal courts of appeal. In another area, an interesting challenge to alleged cultural biases in the curriculum was litigated in a New York City case.

Several cases of a less significant nature were recorded in 1992. Showing that almost anything that occurs in schools can become the subject of a lawsuit, parents of a second grade student filed suit when a teacher would not let the student play a videotape showing her singing a hymn during a "show and tell" hour. Other parents filed suit because a school had denied their daughter an award for perfect school attendance. Finally, two federal courts heard extensive testimony from expert witnesses regarding the meaning of slogans printed on student tee-shirts.

Public School Assignment, Tuition, and Transportation

Tuition and Assignment

Cases reported in this section often involve the legal status of children not residing with a parent. When an informal custody arrangement is present because parents are unable or unwilling to care for their child, school systems may challenge the child's residence. An Illinois state court considered a case of this sort when a child living with his aunt was refused admittance to school without the payment of tuition.[1] The school district had been supplied with the state-required evidence of the parent's financial hardship and incapacity to care for the child, but the district went further, requiring the aunt to provide evidence from a "third-party professional" that the parents were unable to care for the child. A lawsuit followed when letters from a physician and church counselor were not accepted as sufficient evidence. The court ordered the child admitted to school, concluding that the district had exceeded its authority by arbitrarily establishing residence criteria beyond those in the statute.

In an unusual tuition case, a New York court considered the action of a school district when it charged tuition after discovering that a child had attended kindergarten for a year after being enrolled by the parents using a forged birth certificate.[2] The court concluded that the tuition request was reasonable, drawing an analogy between the forgery and the use of a fraudulent address by a nonresident claiming to reside in the district. The court also refused to allow an offset against the tuition charge equal to the school taxes paid by the defendants.

Home Instruction

Home instruction cases to be reviewed in this year's chapter challenged the administration of state home instruction statutes, but failed to mount any significant challenge to the constitutionality of the laws themselves. Two cases addressed state requirements that those offering home instruction meet certain educational requirements. A South Carolina requirement that home instruction parents holding only a high school degree must also pass a basic skills examination was struck down by the state supreme court.[3] The court concluded that the state defendants had failed to prove that the test, the passing of which was required of public school teachers, had been validated as demonstrating the skills needed by instructors in the home.

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[1] Israel S. v. Board of Educ. of Oak Park and River Forest High Sch. Dist. 200, Cook County, Ill., 601 N.E.2d 1264 (Ill. Ct. App. 1992).

[2] Board of Educ. of Bay Shore v. Marsiglia, 582 N.Y.S.2d 256 (App. Div. 1992).

Tennessee statutes require that anyone offering instruction at home to high school students must have a bachelor's degree or receive an exemption to the requirement from the state commissioner. No one, however, has ever been granted such an exemption, and the commissioner's refusal to do so after reviewing four new requests resulted in a legal challenge. An appeals court concluded that the presence of a permissive exemption clause in the statute did not obligate the commissioner to establish criteria for exemptions or to grant them.[4] The court also held that an August 1 date for registering home instruction students with the state served the valid purpose of allowing school districts to plan for fall enrollments.[5] The deadline did not apply to parents who moved to Tennessee and had been educating their children at home elsewhere.

An Arkansas court considered an appeal of a chancery court decision denying a recently divorced mother permission to educate her children at home over the objections of their father.[6] Though the mother had custody of the children, the appeals court concluded that the lower court had not exceeded its authority when it agreed with the father that the children needed the structured programs offered by the public schools.

Compulsory Attendance

Compulsory attendance cases generally focus on the decisions made by lower courts to fine or incarcerate parents who fail to require their children to attend school. An Alabama case fell into this category, with an appeals court deciding that a state statute requiring written notice to a parent whose children did not attend school could not be satisfied by oral communications from an attendance officer.[7]

State statutes denying attendance to children without immunizations when an outbreak of a communicable disease occurs universally have been upheld. The Supreme Court of Nebraska considered such a case for the first time and reached the same conclusion.[8] Preventing the spread of highly contagious rubeola measles was found by the court to be sufficient justification for excluding unvaccinated children.

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[3] Lawrence v. South Carolina State Bd. of Educ., 412 S.E.2d 394 (S.C. 1991).

[4] Crites v. Smith, 826 S.W.2d 459 (Tenn. Ct. App. 1991).

[5] In a related case, the Supreme Court of Iowa reversed a lower court and upheld the misdemeanor conviction of a parent who failed to report that she was educating her children at home. State v. Skeel, 486 N.W.2d 43 (Iowa 1992).

[6] Clark v. Reiss, 831 S.W.2d 622 (Ark. Ct. App. 1992).

[7] Maas v. State, 601 So. 2d 209 (Ala. Crim. App. 1992).

[8] Maack v. School Dist. of Lincoln, 491 N.W.2d 341 (Neb. 1992).

In a most unusual case, Tennessee parents filed suit claiming that their daughter had been improperly denied a perfect attendance award.[9] The child had won the award for perfect attendance in grades one through six, but was denied the award for grade seven when she twice was taken out of school by her father for appointments with the family's physician. The challenged prize policy counted any day a student was in attendance fewer than three hours as an absence. The medical appointments caused absences to be charged against the student. The school's prize policy was challenged on the ground that the school district had not followed state statutes that required school board approval of local attendance policies. This argument was rejected by the appeals court, which held that attendance prize rules were not an "attendance policy" covered by the statute. Costs for the appeal were assessed against the plaintiffs.

Transportation

The Supreme Court of California affirmed a 1991 lower court decision upholding a state law allowing school districts to charge a fee for pupil transportation.[10] The plaintiffs in the case argued that transportation fees should be viewed in the same way as fees for participation in extracurricular activities, which previously had been held unconstitutional by the California court as denying students access to a necessary educational activity. The court rejected the analogy, holding that transportation was a supplemental noneducational service. In dissent, one justice attacked the exemption clause in the state statute that allowed local districts to excuse "indigent" students, arguing that parents who almost, but not quite, met the definition would be forced to choose between bus fare or buying household necessities.

Private and Parochial Schools

Cases arguing the provision of federal funds to sectarian school students are discussed in the later section of this chapter containing cases involving First Amendment religious rights. Two cases discussed here involved state aid to both sectarian and private schools. Four 1992 cases discussed in this section addressed the provision of transportation services to private and parochial school students. In addition, the Supreme Court of Wisconsin considered that state's "parental choice" program, which gives public funds to Milwaukee parents wanting their children to attend nonsectarian private schools.

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[9] Richardson v. Fentress County Sch. Bd., 840 S.W.2d 940 (Tenn. Ct. App. 1992).

[10] Arcadia Unified Sch. Dist. v. Department of Educ., 280 Cal. Rptr.2d 463 (Ct. App. 1991), *aff'd*, 5 Cal. Rptr.2d 545 (Cal. 1992). *See* THE YEARBOOK OF EDUCATION LAW 1992 at 65-6.

The Wisconsin choice program diverts approximately $2,500 per child from state funds going to the Milwaukee public schools and allows parents to use the payment as tuition at a nonsectarian private school. Only parents meeting low-income guidelines can participate. A Wisconsin appeals court in 1990 struck down the Milwaukee choice program because it was included in the state budget, rather than having been considered as a separate piece of legislation.[11] Wisconsin's constitution requires local or private bills to be "separately considered." In overruling the lower court, however, Wisconsin's highest court characterized the tuition-aid program as an experiment that would have statewide significance because school completion rates were of broad concern.[12] In addition to concluding that the program was not "local," the court also rejected two other state constitutional claims, holding that the program did not violate a uniformity school-aid requirement and satisfied the state's public purpose doctrine because it contained adequate controls over the use of the funds. In sharply worded dissents, three justices attacked the plan, with one arguing that it represented the first step on the path toward dismantling the state's public education system.

The four transportation cases involved interpretations of state laws providing transportation to students attending private schools. In the first, the Eighth Circuit Court of Appeals interpreted a Minnesota law requiring a public school district to pay the cost of transportation to a parochial school outside the district if no school within the district provided the instruction.[13] Parents bringing the suit argued that they wished to educate their child at an Evangelical Lutheran Church school outside the district, while the local school district claimed that it was obligated to provide transportation only to one of the Lutheran schools within the district, none of which affiliated with the evangelical Lutheran synod. The parents argued that there were major instructional differences among the Lutheran schools. The appeals court disagreed, denying the transportation request and holding that local school districts should not have to engage in "theological hair-splitting" by trying to decide what differences might exist among different parochial schools within the same general faith.

Ohio law requires that transportation be provided to private school pupils except when a local board determines and the state board confirms that such transportation would be "unnecessary or unreasonable." Parents living on an island sought to have their local school board provide transportation for their children to attend a private school. A lawsuit followed when the school district refused because of its cost. In a four-to-three decision, the Supreme Court of Ohio sidestepped the central issue, holding that the parents' suit should have named the local school board instead of the state board, which had confirmed the local board decision.[14]

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[11] Davis v. Grover, 464 N.W.2d 220 (Wis. Ct. App. 1990).

[12] Davis v. Grover, 480 N.W.2d 460 (Wis. 1992).

[13] Healy v. Independent Sch. Dist. No. 625, 962 F.2d 1304 (8th Cir. 1992).

In a second Ohio transportation case, an appeals court reviewed another part of that state's transportation statute, upholding a provision that exempts districts from having to provide transportation or pay for trips in excess of thirty minutes.[15] The parents had raised an equal protection argument, with the court using a rational relationship test to conclude that conserving school financial resources was adequate justification for the thirty-minute limit. In a similar case, Massachusetts' highest court concluded that a restriction on public funding of transportation only to private schools within the school district did not violate equal protection or free exercise clauses.[16]

An Iowa district court considered a challenge to a state statute providing a tax deduction for private school tuition and the purchase of textbooks.[17] More than 50,000 students attended sectarian and nonsectarian schools in that state. Under the statute, the deducted tuition funds, up to $1,000 for each dependent, could not be used for the teaching of religious tenets, or for worship. Plaintiffs in the case argued that the monitoring of this provision by the state would inevitably lead to excessive government entanglement with religious schools. The court dismissed this claim, suggesting that the "specter of hoards of revenue agents" descending on parochial schools was not reasonable because there were less intrusive methods of gathering such information. Relying on the Supreme Court's decision in *Mueller v. Allen*,[18] in which a similar tax deduction program in Minnesota was upheld, the district court concluded that the Iowa statute did not violate the establishment clause.

New Hampshire's highest court provided that state's senate with an advisory opinion on a proposed bill that would have provided up to 75% of the tuition cost paid by parents to send children to private schools, which could include those with religious affiliations.[19] The court concluded that the plan would violate a state constitutional prohibition against compelling persons to pay for the support of schools "of any sect or denomination."

Substantive Rights of Students

Search and Seizure

Cases involving the searches of students or their possessions continued at a high volume, as attorneys sought to have school expulsions or criminal convictions overturned on the ground that a search was invalid. In viewing searches in schools, courts rely on the Supreme Court's decision in *New Jersey v. T.L.O.*[20] *T.L.O.* determined that warrantless school searches can occur if there is reasonable suspicion at the inception of a search that a law or school rule has been broken. Such searches, however, must not be "excessively intrusive" in light of the age and sex of the student. Courts continued in 1992 to grant schools broad latitude to search for drugs and weapons, with only one case favoring plaintiffs challenging a search.

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[14] Haig v. Ohio State Bd. of Educ., 584 N.E.2d 704 (Ohio 1992).
[15] Novak v. Revere Local Sch. Dist., 583 N.E.2d 1358 (Ohio Ct. App. 1991).
[16] Fedele v. School Comm. of Westwood, 587 N.E.2d 757 (Mass. 1992).
[17] Luthens v. Blair, 788 F. Supp. 1032 (S.D. Iowa 1992).
[18] Mueller v. Allen, 463 U.S. 388 (1983).
[19] Opinion of the Justices, 616 A.2d 478 (N.H. 1992).

In an interesting case involving an issue being litigated for the first time, a New York court upheld the use of a metal detector in a school search.[21] Under the New York City system for using the detectors, a sign warning of the search was posted and hand scanners were used at school entrances on both students and their possessions. If the scanner indicated the possible possession of a weapon, follow-up searches were conducted in private by officers of the same sex if a pat-down search of a student's person was called for by the detector. In the case leading to the challenge, a search of a high school student's book bag revealed that she was carrying a switchblade knife. The court upheld the search, finding that it was minimally intrusive, searching only for weapons under a detailed set of procedures. Comparing the school search using detectors to similar searches in airports and courtrooms, the court found that the required balance between the need for safety in school and the rights of students for privacy was met by the search system.

In another New York case involving weapons in school, a security guard watching a student put down a book bag heard a dull thud when the bag hit a metal cabinet. Upon closer investigation, the guard felt the outline of a gun in the bag. A court reviewing the search concluded that the guard had reasonable suspicion to search the bag.[22] In a similar case, a guard directing a student toward an office brushed up against a gun tucked in the student's waistband and was not found to have conducted an unreasonable search.[23] Likewise, an Oregon court reviewing the search of a student's fanny pack in which a gun was hidden, upheld the search, ruling that reports from other students about the gun gave school officials cause to conduct the search.[24]

Drugs were found in a number of searches that led to litigation reported in 1992. In a Massachusetts case, a student reported to a teacher that another student had offered to sell him marijuana. A subsequent search of the alleged drug seller revealed bags of marijuana in a video cassette case. The search was upheld, with the Massachusetts court also ruling that school administrators conducting searches do not have to read students their rights under *Miranda v. Arizona*,[25] as would law enforcement personnel, before asking them about drug sales. It also was held that school systems do not have to divulge the names of student informers in such cases.[26] In another case involving an informant, a New Jersey court held that a principal had reasonable suspicion to search a student's book bag after another student reported that drugs stored in the bag were being sold.[27] The search revealed seventy-five vials of cocaine.

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[20] New Jersey v. T.L.O., 469 U.S. 325 (1985).

[21] People v. Dukes, 580 N.Y.S.2d 850 (Crim. Ct. 1992).

[22] *In re* Gregory M., 587 N.Y.S.2d 731 (App. Div. 1992).

[23] *In re* Kevin P., 587 N.Y.S.2d 730 (App. Div. 1992).

[24] State *ex rel.* Juvenile Dep't of Wash. County v. DuBois, 821 P.2d 1124 (Or. Ct. App. 1991).

A search that uncovered thirty vials of narcotics in a student's pocket was held to be reasonable in a Pennsylvania case.[28] An undercover police officer saw the student in a hallway holding a plastic bag in one hand and money in the other. In spite of the fact that the search was conducted by a police officer and an arrest followed, the court used the *T.L.O.* reasonableness test in reviewing the challenge to the search, rather than analyzing the presence or absence of probable cause.

In the one case in which plaintiffs were successful in challenging a search, several unsuccessful searches of the plaintiff preceded the search of the automobile where cocaine was found. A principal who had received a report that the plaintiff was selling drugs required the plaintiff to submit to a pat-down search, empty his pockets, remove his shoes, and lower his trousers. No drugs were found. A week later, the student was suspected of skipping school and again was subjected to a search of his clothing and person. Again nothing was found. Later that day, drugs were found when school personnel searched the student's automobile trunk. The court found the car search to be unreasonable. Using language from *T.L.O.*, it held that the search was excessive because it was unrelated to the suspected truancy infraction.[29]

A school district drug testing policy for athletes was considered by an Oregon district court.[30] Drug tests constitute a search and their use as a prerequisite for participation in athletics has been upheld by a federal court of appeals decision.[31] The challenged policy developed by the Oregon school district was similar to that sustained by the Seventh Circuit. Positive drug tests led to the opportunity for drug counseling and subsequent positive tests to a withdrawal of athletic participation privileges. In upholding the policy, the Oregon court considered the limited scope of the program and the fact that it was directed at a recognized community problem that had defied solution using other means.

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[25] Miranda v. Arizona, 384 U.S. 436 (1966).

[26] Commonwealth v. Snyder, 597 N.E.2d 1363 (Mass. 1992).

[27] State v. Moore, 603 A.2d 513 (N.J. Super. Ct. 1992).

[28] *In re* S.F., 607 A.2d 793 (Pa. Super. Ct. 1992).

[29] Coronado v. State, 835 S.W.2d 636 (Tex. Crim. App. 1992).

[30] Acton v. Vernonia Sch. Dist. 47J, 796 F. Supp. 1354 (D. Or. 1992).

[31] Schaill v. Tippecanoe County Sch. Corp., 864 F.2d 1309 (7th Cir. 1989). *See* THE YEARBOOK OF EDUCATION LAW 1989 at 71-2.

The policy was not, the court concluded, a "fishing expedition" to uncover drugs as part of some sort of "moral crusade." While the program was seen as causing some embarrassment to students who had never consumed drugs or alcohol, the court held that its intrusiveness was outweighed by the compelling need for the school system to address an obvious drug problem.

First Amendment Religious Rights

Cases addressing religion and public schools continued at a high rate in 1992. These cases fell into four broad categories. The first group presents allegations that the establishment clause was violated by school officials who permit prayers at baccalaureate services or school commencements. A United States Supreme Court decision with an unexpected result concerning graduation prayers will be discussed. The second general area concerns the introduction of religious themes and messages in the school curriculum. The third area involves the distribution of religious materials on school grounds and in school buildings. Cases arguing that governmental expenditures improperly benefit sectarian schools will be discussed at the end of this section.

The Supreme Court's much awaited decision regarding the constitutionality of prayers at graduation ceremonies was delivered in 1992. Plaintiffs in the case challenged a school policy that required different invocation speakers each year, some of whom presented religious messages and some of whom offered nonsectarian greetings, all under the direction of district guidelines regarding the content of the messages. When the case was reviewed by the First Circuit, two competing perspectives on the constitutionality of the policy were offered by the majority opinion and in the dissent.[32] The majority used the traditional "test" found in *Lemon v. Kurtzman*[33] and concluded that the prayers had the primary effect of advancing religion. The First Circuit dissent argued that such prayers should be viewed as "solemnizing" the graduation event, relying on *Marsh v. Chambers*.[34]

In a five-to-four decision, the Court concluded that the prayer policy violated the establishment clause.[35] While the Court's opinion explicitly stated that the justices were not abandoning *Lemon*, the Court made little reference to the case and its review criteria, relying instead on much earlier cases concluding that prayer in elementary and secondary schools carried the special risk of coercion and placed the student dissenter in the difficult position of either protesting or participating in the prayer.[36] The Court also found that the challenged school policy put school administrators in the impossible position of ensuring that prayers were nonsectarian and represented different viewpoints. The administrator's role in reviewing prayers was, for Justice Souter, the case's central issue. In his concurring opinion, joined by two other justices, he argued that this role "would compel the government and, inevitably, the courts to make wholly inappropriate judgments about the number of religions the State should sponsor and the relative frequency with which it should sponsor each."[37] The four dissenting justices stressed the "long tradition" of prayers at commencement and argued that the establishment clause should not apply to short religious messages presented at ceremonial occasions.

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[32] Weisman v. Lee, 728 F. Supp. 68 (D.R.I. 1990), *aff'd*, 908 F.2d 1090 (1st Cir. 1990).

[33] Lemon v. Kurtzman, 403 U.S. 602 (1971) (to avoid violating the establishment clause the challenged practice must have a secular purpose, must neither advance nor inhibit religion, and must not lead to excessive state entanglement with religion).

[34] Marsh v. Chambers, 463 U.S. 783 (1983) (prayers before the start of a legislative session are embedded in the country's history and tradition and do not constitute the establishment of religion).

[35] Lee v. Weisman, 112 S. Ct. 2649 (1992).

One commencement prayer case decided later in 1992 used the Supreme Court's *Lee v. Weisman* establishment clause analysis. In a 1991 Fifth Circuit case vacated and remanded by the Supreme Court to be reconsidered in light of *Weisman*, the Fifth Circuit was asked to reexamine a school district's policy of offering "nonsectarian, nonproselytizing" graduation invocations.[38] The invocations were offered by student volunteers selected by graduating seniors, a system unlike that addressed in *Weisman*. While the message to be delivered by the senior had to be "accepted" by school administrators, the Fifth Circuit concluded that the role of the district was significantly different than the one reviewed by the Supreme Court. Addressing the question of coercion presented by *Weisman*, the appeals court held that the role of the graduating class in selecting the presenter meant that students "are aware that any prayers represent the will of their peers who are less able to coerce participation than an authority figure from the state or clergy."[39] Holding that people who attended the ceremony should "not be surprised to find the event affected by community standards," the court upheld the invocation policy.

In a case decided before *Weisman* and presenting similar facts, a Kansas district court reviewed an invocation policy providing for student-led prayers that were "nonsectarian, nondoctrinal, and nonproselytizing."[40] The students delivering invocations were selected by school administrators who read the proposed messages to ensure that they complied with the district's content requirement. Concluding that the prayers had a secular purpose, the court refused to find that the district's policy violated the establishment clause.

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[36] Engel v. Vitale, 370 U.S. 421 (1962), and Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

[37] Lee v. Weisman, 112 S. Ct. 2649, 2671 (1992).

[38] Jones v. Clear Creek Indep. Sch. Dist., 930 F.2d 416 (5th Cir. 1991), *vacated*, 112 S. Ct. 3020 (1992).

[39] Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 971 (5th Cir. 1992).

[40] Griffith v. Teran, 794 F. Supp. 1054 (D. Kan. 1992).

In a case that started with challenges to a district's baccalaureate service, its use of prayers at commencement ceremonies, and requirements that students write papers with religious themes in English classes, the Third Circuit ruled on several procedural issues and remanded to allow the district court to hear evidence on a number of factual disputes.[41] The appeal was made by parties favoring commencement prayers after a consent decree had ended the practice. On remand, the lower court was asked to consider whether the graduation ceremony was a public forum and, assuming it was not, whether a proposed district policy to exclude prayers was a reasonable content-based restriction. If the lower court concluded that prayers could be excluded, those favoring the prayers were to be given standing to file briefs in the case.

The presence of religious issues and messages in classrooms was the subject of a number of interesting cases. Parents of a fifth-grade Pennsylvania student who sought to distribute a survey about her classmate's belief in God, filed a lawsuit when the girl was denied permission to gather the information and when she was forced to make a required class presentation in the library with only her teacher present. The content of her presentation on "the power of God" was a proselytizing message about the power of prayer. The court concluded that the class project was intended to teach students research skills and not to create an open forum in the classroom for student expression.[42] Given the age of the students and the relationship of the assignment to the school curriculum, the court found that the school had acted reasonably in excluding the religious message from the classroom.

A second-grade student sought to play a videotape showing her singing a religious song during her class "show and tell" period. The song had been recorded at a local Baptist church. When she was denied the opportunity her parents filed suit.[43] As in the previous case, the district court concluded that the classroom was a closed forum and that the school might exclude the religious message without denying the plaintiff's free exercise rights.

In a case involving an issue not seen in recent years, a California teacher who refused to teach the theory of evolution in his biology class challenged the California law requiring the instruction. He argued that evolution was a religious theory and that the statute requiring the instruction violated the establishment clause. He also argued that his right to free speech was violated because he could not use the theory of creationism to explain the origin of life. Characterizing the plaintiff as a "loose cannon," the court refused to find either that evolution was a reli-

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41. Brody v. Spang, 957 F.2d 1108 (3d Cir. 1992).
42. Duran v. Nitsche, 780 F. Supp. 1048 (E.D. Pa. 1991).
43. DeNooyer v. Livonia Pub. Schs., 799 F. Supp. 744 (E.D. Mich 1992).

gion or that the plaintiff had a free speech right to ignore the state and local curriculum.[44]

Illinois plaintiffs challenged the use of an elementary-level reading series which they alleged advanced religious views in violation of the establishment clause.[45] The plaintiffs alleged that stories in the series that contained witches and folk tales constituted endorsement of paganism. Granting the district's request for summary judgment, the court concluded that the series as a whole did not endorse any religious belief.

A state of New York regulation requiring that representatives of religious organizations be present on advisory councils overseeing the development of programs to address the spread of AIDS was heard by that state's highest court.[46] Using the criteria contained in *Lemon*, the court concluded that there was no establishment clause violation, holding that taking religious perspectives into account when setting governmental policies did not constitute an endorsement of religion. Instead, the court found that such involvement would meet the secular goal of finding a curriculum that would be more successful in addressing the spread of the disease. In dissent, two justices argued that the policy had the primary effect of endorsing religion, in violation of *Lemon*.

The distribution of condoms to students in New York City was upheld in the face of free exercise and due process challenges.[47] The condoms were made available to high school students anonymously and without parental consent in health resource rooms, as part of the district's program to combat the spread of AIDS. The court held that the availability of condoms outside the classroom as part of a voluntary program did not have a significant impact on the plaintiffs and that they had no constitutional right to tailor school programs to meet their own religious preferences. The court also held that the distribution of condoms was not a "health service" under the meaning of the state law requiring parental permission before such services could be administered to minors.

The distribution of religious tracts by students was considered by an Illinois district court, with the court concluding that a school policy permitting students to distribute only materials that they had written, and only to do so before and after school at a table set up near the school entrance, was too restrictive.[48] As seen in other recent decisions on this subject, the Illinois court concluded that schools were not open forums and that time, place, and manner restrictions regarding the distribution of religious tracts could be established. In this case, however, the requirement that the distribution occur only at a table near the entrance

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44. Peloza v. Capistrano Unified Sch. Dist., 782 F. Supp. 1412 (C.D. Cal. 1992).
45. Fleischfresser v. Directors of Sch. Dist. 200, 805 F. Supp. 584 (N.D. Ill. 1992).
46. New York State Sch. Bds. Ass'n v. Sobol, 582 N.Y.S.2d 960 (Ct. App. 1992).
47. Alfonso v. Fernandez, 584 N.Y.S.2d 406 (Sup. Ct. 1992).
48. Hedges v. Wauconda Community Unit Sch. Dist. No. 118, 807 F. Supp. 444 (N.D. Ill. 1992).

and only with teachers standing nearby gave, the court reasoned, an impression that the school was sanctioning or was involved in the distribution, thereby violating the establishment clause. In addition, the court also found that the requirement that only student-written materials be distributed was too restrictive. The plaintiffs were awarded $10 in damages.

A Dallas policy in force in 1984-85 that prohibited students from meeting for "religious purposes" on school grounds before and after school, and actions taken by school administrators to prevent the distribution of religious tracts, were the subject of litigation, with the plaintiffs seeking damages and fees.[49] The disputed policies were changed after the litigation was filed. In a brief analysis designed to clear the ground for damage claim consideration, the court granted summary judgment to the plaintiffs on the question of the distribution of the tracts, holding that there never was evidence that offering students the materials as they left school buses was disruptive. Summary judgment was denied on the question of the meetings, with the record being unclear as to whether meetings outside the cafeteria, which sometimes involved bullhorns, were disruptive.

The Sixth Circuit considered an appeal of one in a series of cases filed in recent years concerning the provision of remedial education funds to private school children under chapter 1 of the Elementary and Secondary Education Act.[50] At issue in the case was the use of an "off-the-top" provision to give parochial schools funds to purchase portable vans so that federally funded instruction would not occur in parochial school buildings. A lower court held that this resulted in "grossly disproportionate" funds going to the private schools, thereby violating the establishment clause. The appeals court reversed.[51] Agreeing with several recent federal court decisions,[52] the Sixth Circuit concluded that "comparable services," not comparable per-pupil expenditures, were required by the chapter. Were the cost of the vans to be factored into the parochial school pupils' allocation, they would receive only a third of the services available to students attending public schools.

First Amendment Freedom of Expression

Expression cases in 1992 focused on the powers of school districts to regulate student appearance, with two cases involving slogans written on tee-shirts, one considering hair length, and one addressing protest buttons. The Seventh Circuit heard an appeal challenging the constitutionality of an Illinois statute requiring recitation of the Pledge of Allegiance in elementary schools.[53] Plaintiffs in the case objected to the pledge because the words "under God" contained in it were offensive to their beliefs as atheists. The lower court found that the Illinois law satisfied all three parts of the *Lemon* analysis because the statute did not explicitly require *all* students to recite the pledge and did not contain any penalties for not participating, suggesting to the court that students with a religious or philosophical objection to the pledge could remain silent. The Seventh Circuit agreed with this analysis, finding that the pledge language did not represent any endorsement of religion and that its recitation was a patriotic rather than a religious exercise.

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[49] Clark v. Dallas Indep. Sch. Dist., 806 F. Supp. 116 (N.D. Tex. 1992).

[50] 20 U.S.C. § 2701 *et seq.* (1988).

[51] Barnes v. Cavazos, 966 F.2d 1056 (6th Cir. 1992).

[52] Pulido v. Cavazos, 934 F.2d 912 (8th Cir. 1991), Walker v. San Francisco Unified Sch. Dist., 761 F. Supp. 1463 (N.D. Cal. 1991). *See* THE YEARBOOK OF EDUCATION LAW 1992 at 70-1.

The Ninth Circuit considered an interesting case in which students had been asked by school officials not to wear buttons with the word "scab" written on them during a teacher strike.[54] Some of the children involved had parents who were striking teachers. A district court had dismissed the case, relying on a Supreme Court decision that upheld a school's actions taken against a student who had used sexual innuendos in a student government nominating speech.[55] The district court concluded that the wearing of the buttons was "inherently disruptive," as was the vulgar nominating speech. The Ninth Circuit reversed and remanded the case, disagreeing with the lower court that the wearing of a protest button was in and of itself disruptive. The court observed that when arguably political speech was directed against those who seek to suppress it, those officials do not have "limitless discretion" to suppress it, relying on the Supreme Court's earlier protest button decision in *Tinker*. The lower court was asked to reconsider the question of the disruption caused by the buttons.

Twenty-six high school students were suspended for wearing and refusing to change tee shirts bearing the slogan, "The best of the night's adventures are reserved for people with nothing planned." The shirts had been produced by students and worn for some weeks when the district's superintendent concluded that the slogan had been lifted from an alcoholic beverage advertising campaign. The wearing of shirts with alcoholic beverage advertisements is prohibited by school rules. After hearing expert witnesses from the advertising industry and listening to students, the court concluded that the slogan was not, in fact, an advertisement, because it was not linked on the shirts with any specific alcoholic beverage. Finding the shirt conveyed an idea, rather than a product endorsement, the court found that the students had made a *prima facie* showing of a First Amendment rights violation. The superintendent was enjoined from banning the shirts.[56]

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[53] Sherman v. Community Consol. Sch. Dist. 21 of Wheeling Township, 758 F. Supp. 1244 (N.D. Ill. 1991), *aff'd*, 980 F.2d 437 (7th Cir. 1992).

[54] Chandler v. McMinnville Sch. Dist., 978 F.2d 524 (9th Cir. 1992).

[55] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).

[56] McIntire v. Bethel Sch., Indep. Sch. Dist. 3, 804 F. Supp. 1415 (W.D. Okla. 1992).

A seventh-grade student wearing a tee shirt with eight-inch-high letters proclaiming "Drugs Suck" was suspended from school for a day. Expert witnesses in this case focused on the word "suck," with opposing university professors disagreeing on whether the word had a sexual connotation and, if it did, what its impact might be on junior high school students. The district court concluded, using several different lines of analysis, that the school could reasonably forecast disruption in the classroom when students appeared wearing such shirts, thereby dismissing the plaintiffs' First Amendment claims.[57]

Texas parents claimed that their third-grade son had suffered mental anguish as the result of a school rule regulating the length of his hair. The student was placed in an in-school suspension room when he refused to cut a thin ponytail that extended below his shirt collar in violation of the rule. After a lower court granted summary judgment to the local district, the parents appealed. The appeals court reversed, in part, holding that the parents' claim that the grooming policy violated gender discrimination statutes merited a full evidentiary hearing.[58]

Sanctions for Student Misconduct

Suspensions and Expulsions

Challenges to the procedures used to suspend or expel students almost always make reference to the Supreme Court's decision in *Goss v. Lopez*.[59] *Goss* requires that students being suspended for ten days or fewer be afforded the opportunity to know why they are being suspended and a chance to tell their version of the event. In cases involving longer suspensions or expulsions, more due process must be given. The Supreme Court has never directly addressed the procedures to be used for expulsions, the "academic capital punishment" of the school disciplinary system, though lower courts have made it clear that students have the right to legal representation and more formal hearings in such cases. Litigation reported in this section involves disputes over the form and substance of both suspension and expulsion hearings. No significant new issues were decided in cases recorded in 1992.

Two cases considered the powers of school systems to discipline students for offenses that occurred off school grounds. In the first, Massachusetts' highest court considered the expulsion of a student for the remainder of the school year.[60] The student was expelled for assaulting another student on a nearby street, though the altercation between the two started in the school. The court concluded that the penalty was appropriate because the offense had a clear link to an in-school incident.

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[57] Broussard v. School Bd. of Norfolk, 801 F. Supp. 1526 (E.D. Va. 1992).
[58] Toungate v. Bastrop Indep. Sch. Dist., 842 S.W.2d 823 (Tex. Ct. App. 1992).
[59] Goss v. Lopez, 419 U.S. 565 (1975).
[60] Nicholas B. v. School Comm. of Worcester, 587 N.E.2d 211 (Mass. 1992).

In a case without any link to in-school misbehavior, a student was expelled for selling cocaine on three occasions to a police undercover agent. A Delaware court concluded that the school's concern about having a "known drug dealer" among its student population was an adequate reason for removing the student from school.[61]

Courts hearing school discipline cases seldom find merit in substantive due process claims that school rules are too harsh or that penalties are too severe. In a case considering these issues, but without making reference to precedents discussing the standards for reviewing such cases, an Alabama appeals court held that a juvenile court should have considered whether a school board decision to expel a student was "right or wrong."[62] The appeals court found that the juvenile court had original jurisdiction in the case and should consider more than just procedural challenges. The case involved the permanent expulsion of the thirteen-year-old student for bringing a gun to school.

A New York court affirmed a two-day suspension of a student who stole muffins from a school cafeteria, but found that the student's removal from his wrestling team for the balance of the season was excessive.[63] The offense occurred just prior to a school recess and the student was unable to secure a hearing from the school board on the penalty; he was, however, allowed to compete in a state wrestling tournament but only after he secured a temporary restraining order. The court found that the unavailability of school officials and the board to consider the case constituted a due process violation and that the suspension of the student from athletics, made by the school's athletic director, was arbitrary. The director's policies never had been adopted by the school board, adding to what the court considered to be the procedural irregularities contained in the case.

A student who hit a teacher unsuccessfully challenged his one-year expulsion on the ground that the teacher was not available to be questioned at the expulsion hearing.[64] While courts have held that cross examination of witnesses is not necessary where other students are involved, particularly in drug cases, employees generally participate in hearings. In this instance, however, the court observed that the student's attorney did have the opportunity to challenge the teacher's affidavit and had called witnesses to present different perspectives on the incident. For the district court, this represented adequate due process, with the court noting that it rejected "any suggestion that the technicalities of criminal procedure ought to be transported into school suspension cases."

An Illinois district court considered an interesting issue in the case of a student who was suspended for three days for allegedly stealing a can

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61. Howard v. Colonial Sch. Dist., 605 A.2d 590 (Del. Super. Ct. 1992).
62. C.L.S. v. Hoover Bd. of Educ., 594 So. 2d 138 (Ala. Civ. App. 1991).
63. Manico v. South Colonie Cent. Sch. Dist., 584 N.Y.S.2d 519 (Sup. Ct. 1992).
64. Johnson v. Humble Indep. Sch. Dist., 799 F. Supp. 43 (S.D. Tex. 1992).

of soda from a teachers' lounge.[65] The school board's decision in the case was described in a memorandum distributed to teachers using student messengers. The memo was not placed in an envelope and its contents soon were discussed broadly among students. The public disclosure of this information, which the court concluded was part of the student's confidential school record, violated a provision of the state's student records law. Because the disclosure constituted possible negligence on the part of the school, the court declined to grant summary judgment to the district. The court characterized both parties in the case as "intractable" and the case itself as "a poor use of [the court's] limited resources."

Three exclusionary discipline cases raised minor issues that were addressed by courts of appeal. In a case raising a multitude of issues decided in favor of the defending school district, a district court refused to grant summary judgment to the district on a challenge to its policy of not permitting students facing expulsion to return to school at some point to retrieve possessions from their school lockers.[66] An Ohio court found that the decision to expel a student, made in a closed meeting of the school board, was not prejudiced by the presence of school administrators in the room.[67] Finally, a Florida court found that a student could return to school after being expelled by a school board unless the board entered a temporary or formal written notice in the case, thereby making it possible for the student to appeal.[68]

Bilingual-bicultural Programs

New York City plaintiffs representing African-American children filed suit under 42 U.S.C. sections 1981 and 1983 and title VI of the Civil Rights Act of 1964[69] alleging that the curriculum used in the public schools was racially and culturally biased, thereby causing psychological harm and diminishing the ability of children to receive an education. In sum, the plaintiffs argued that the curriculum taught that "only Europeans or those of European descent have accomplished anything or contributed anything to the world order." In what may be the first chapter in a lengthy lawsuit, a district court was confronted with a number of questions concerning the standing of federal, state, and local defendants, and the rights of action claimed by the plaintiffs.[70]

The federal defendants argued successfully that none of the alleged wrongs suffered by the children of New York City was "fairly traceable" to federal actions. Aside from providing federal funds, the federal defendants were precluded by federal regulations from setting local or state educational policies. Thus, there was no "line of causation" from the federal government to the disputed curriculum, and the federal defendants were dismissed. The court continued, however, holding that even if the federal defendants were not dismissed, title VI does not contain a private right to sue the secretary to terminate funding. The court concluded that to permit such suits would "circumvent" the "elaborate procedures" on funds termination contained in the title, using as authority for its conclusion a Second Circuit case denying an implied right of action under section 504 of the Rehabilitation Act of 1973.[71]

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[65] Sieck v. Oak Park-River Forest High Sch. Dist. No. 200, 807 F. Supp. 73 (N.D. Ill. 1992).

[66] Craig v. Selma City Sch. Bd., 801 F. Supp. 585 (S.D. Ala. 1992).

[67] Armstead v. Lima City Bd. of Educ., 600 N.E.2d 1085 (Ohio Ct. App. 1991).

[68] Mitchell v. Leon County Sch. Bd., 591 So. 2d 1032 (Fla. Dist. Ct. App. 1991).

[69] 42 U.S.C. § 2000d *et seq.*

[70] Grimes v. Cavazos, 786 F. Supp. 1184 (S.D.N.Y. 1992).

State and local defendants also sought to have the case dismissed for lack of subject matter jurisdiction and for failure to state a claim, but the court concluded that these issues were not ready to be resolved. The plaintiffs were given two months to file an amended complaint, but the grounds under which they might do so were muddied by the court's dismissal of the section 1981 claims and by the finding that discriminatory intent on the part of those establishing the curriculum had not been shown, leading the court to dismiss the section 1983 claim.

Desegregation

The question of the standards to be used by courts in deciding if school systems involved in desegregation disputes had reached unitary status was addressed by the Supreme Court in a 1992 opinion that came to the court from the Eleventh Circuit. Two conflicting approaches were recorded by the lower courts hearing the case, with the district court reviewing the criteria contained in *Green v. New Kent County School Board*[72] and taking the approach that the DeKalb County, Georgia district could be removed from court supervision one area at a time. The district court concluded that the school system was not unitary with respect to two *Green* criteria (i.e., faculty assignment and resource allocation), and with one non-*Green* criterion added by the court (i.e., the quality of education being offered to white and black student populations). The Eleventh Circuit reversed, holding that unitary status could be attained only when a district had simultaneously met all the criteria for several years.[73]

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[71] 29 U.S.C. § 794. *See* Marlow v. United States Dep't of Educ., 820 F.2d 581 (2d Cir. 1987), *cert. denied*, 484 U.S. 1044 (1988).

[72] Green v. New Kent County Sch. Bd., 391 U.S. 430 (1968) (all traces of discrimination must be removed in six areas: student assignments, faculty assignments, resource allocation, transportation, physical facilities, and extracurricular activities).

[73] The Eleventh Circuit decision disagreed with the approach taken by the First Circuit which held that the criteria could be satisfied one at a time. *See* Morgan v. Nucci, 831 F.2d 313 (1st Cir. 1987).

The Court's decision in *Freeman v. Pitts*[74] upheld the district court's analysis, holding that lower courts could relinquish their supervision of desegregation disputes in incremental stages. The Court's opinion stated that this approach clarified the rationale the Court had used in *Pasadena City Board of Education v. Spangler*,[75] wherein the Court found that a district court had exceeded its authority by making annual changes in Pasadena attendance-zone boundaries in response to changes in school racial composition attributable to demographic shifts rather than to school district decisions. *Freeman* went on to add, however, that the burden of proof was on the school district to show that changes in school enrollment were "not traceable, in a proximate way, to the prior violation."[76] Finally, the Court did not set a specific period of time in which a district must be in compliance before court supervision could end, with the Court adding that, "a history of good-faith compliance is evidence that any current racial imbalance is not the product of a new *de jure* violation. . . ."[77] Three concurring opinions were filed in the case, with no justice dissenting.

Cross-district Remedies

None of the cases arguing about cross-district remedies made reference to *Freeman*, though it was discussed in several desegregation plan oversight cases presented in the next section. In the first cross-district case to be reviewed, the Fourth Circuit considered the question of whether, in fact, a lower court had correctly concluded that Charleston County, South Carolina schools were eight separate districts instead of one.[78] All parties in the case agreed that the eight separate districts were desegregated to the maximum extent possible. Likewise, all parties agreed that a single county district, were it found to exist, would require massive desegregation programs.

The lower court held that the county district distributed tax revenues among the eight constituent districts, alleviating the impact of uneven tax bases, and served other administrative functions, but that the key policies that might relate to school segregation, such as pupil and teacher assignments, were made by the eight local districts. At the heart of their appeal, the federal plaintiffs argued that this governance structure, which was established by the state legislature in 1963, had been created to avoid school desegregation.

The Fourth Circuit concluded that the eight districts were, in fact, independent entities and that no further desegregation therefore was required.[79] While acknowledging that some politicians in 1963 heralded the county district system as a way of avoiding integration, the Fourth Circuit refused to conclude that this was proof of discriminatory intent. Using the powers of state education departments as an analogy, the court noted that many states assign tax revenue distribution and other functions to state education departments without creating single state school districts as a result. The eight local districts were cautioned by the court not to use race as a factor when considering student requests for interdistrict transfers.

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[74] Freeman v. Pitts, 755 F.2d 1423 (11th Cir. 1989), *rev'd*, 112 S. Ct. 1430 (1992).

[75] Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976).

[76] 112 S. Ct. at 1447.

[77] *Id.* at 1449.

[78] United States v. Charleston County Sch. Dist., 738 F. Supp. 1513 (D.S.C. 1990).

A 1985 Eighth Circuit decision reviewing school segregation in Little Rock and surrounding districts refused to order the consolidation of the districts, but approved a series of desegregation measures that would be funded, in part, by the state. A later Eighth Circuit decision approved a settlement in the case, including a $100 million state contribution.[80] Last year, the district court, now with a different presiding judge, refused to approve the millage necessary to implement the plan, asserting that while the millage formulas were contained in earlier decisions, they were not explicitly reaffirmed by the Eighth Circuit in its 1991 decision. Overturning this decision, the Eighth Circuit held that the "law-of-the-case doctrine" makes it unnecessary for subsequent decisions to restate previously settled issues.[81] The lower court was ordered to implement the millage.

The Sixth Circuit considered an appeal filed by the state of Ohio in response to a district court decision holding it responsible for funding a desegregation remedy in an amount in excess of the sum to which it had agreed in a consent agreement.[82] The state had agreed to pay a sum not to exceed $1 million, or half of the costs, whichever was less. The state paid its million dollars, but the actual costs of the remedy turned out to be more than three times as much. Rejecting comparisons with other Ohio desegregation cases where the state was obligated to pay half the total costs, the Sixth Circuit held that the state should pay no more than it voluntarily offered, because it had never been found to be responsible for a constitutional violation, unlike the other Ohio cases.

Minor issues frequently are appealed in desegregation oversight cases, forcing federal courts to make decisions about the details of school desegregation plans. In the first of several cases of this type to be discussed, Missouri appealed a lower court decision involving the tuition for two Kansas City students involved in an interdistrict transfer plan, with the Eighth Circuit concluding that the lower court had sufficient factual foundation for its conclusion.[83] A district court overseeing desegregation in St. Louis reviewed and approved student assignment proposals.[84] In the same litigation, the Eighth Circuit reviewed and approved the purchase of a small amount of capital equipment for magnet schools, concluding that the district court's criterion that such equipment must be "absolutely needed" to qualify for state funding was too stringent.[85]

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[79] United States v. Charleston County Sch. Dist., 960 F.2d 1227 (4th Cir. 1992).

[80] Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist., 921 F.2d 1371 (8th Cir. 1990).

[81] Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist., 971 F.2d 160 (8th Cir. 1992).

[82] Lorain NAACP v. Lorain Bd. of Educ., 979 F.2d 1141 (6th Cir. 1992).

Desegregation Plan Oversight

The Tenth Circuit was directed to reconsider its 1989 opinion in *Brown v. Board of Education of Topeka*[86] after the Supreme Court vacated the decision and remanded it for reconsideration in light of its decisions in *Freeman* and *Board of Education of Oklahoma City v. Dowell.*[87] The Tenth Circuit's 1989 decision ordered a reopening of the historic desegregation case, holding that the school district had not demonstrated that current segregation in the system was not a vestige of past segregation. The decision held that no current showing of intent to segregate was necessary and the lower court was ordered to hold hearings on possible remedies. Hearing the case after the Supreme Court's remand, the Tenth Circuit held that its previous decision should be reinstituted "in full."[88]

The appeals court opinion cited the language in *Freeman* placing the burden of proof on the school district to show that the prior violation was not "traceable" to the current patterns of segregation. Nothing in *Freeman* or *Dowell*, the opinion observed, required a new showing of discriminatory intent on the part of the school system. Noting the district court had found that Topeka had not achieved unitary status in the areas of staff and student assignments, the district court again was instructed to hold hearings and order remedies. The dissenting judge in the two-to-one decision observed that it would be hard to tell from the court's opinion that the school districts actually had prevailed in *Freeman* and *Dowell*, characterizing the majority as accepting only "perfect racial balancing."

The return of *Dowell* to the district court after the case was remanded by the Supreme Court again resulted in a finding that the district had achieved unitary status.[89] In a lengthy decision, the lower court again concluded that the district had complied in good faith with desegrega-

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83. Jenkins *ex rel.* Agyei v. Missouri, 965 F.2d 654 (8th Cir. 1992).
84. Liddell v. Board of Educ. of St. Louis, 795 F. Supp. 930 (E.D. Mo. 1992).
85. Liddell v. Board of Educ. of St. Louis, 967 F.2d 1241 (8th Cir. 1992).
86. Brown v. Board of Educ. of Topeka, 892 F.2d 851 (10th Cir. 1989), *vacated and remanded*, 112 S. Ct. 1657 (1992). *See* THE YEARBOOK OF EDUCATION LAW 1991 at 86.
87. Board of Educ. of Okla. City v. Dowell, 498 U.S. 237 (1991) (good faith compliance with court orders must be considered as a factor in deciding if districts should be released from court supervision; court orders in desegregation cases were not intended to extend indefinitely). *See* THE YEARBOOK OF EDUCATION LAW 1992 at 83-4.
88. Brown v. Board of Educ. of Topeka, 978 F.2d 585 (10th Cir. 1992).
89. Dowell v. Board of Educ. of Okla. City, 778 F. Supp. 1144 (W.D. Okla. 1991).

tion decrees and that all effects of segregation had been eradicated "to the extent practicable." In a subsequent decision, the district court refused to give the plaintiffs in the case permission to file a motion for relief from the judgment.[90] Assuming the Tenth Circuit again reverses the district court and reasserts its previous Oklahoma City opinion, as it did in the Topeka case, the Supreme Court again will be faced with addressing the two markedly different approaches to desegregation case analysis.

A desegregated high school started in 1970 in Macon County, Alabama was proposed to be closed by the county school board and its students reassigned to a much larger school which would have less than a 10% white student population. The desegregated school had held to approximately a fifty-fifty racial composition for almost twenty years. Finding that the school district had failed to demonstrate that maintaining the underenrolled integrated school would be an excessive financial burden, and concluding that the closing would promote segregation, the Eleventh Circuit affirmed a lower court order preventing the closing.[91]

In a second school closing case, the Eleventh Circuit considered the shutting of a county's only predominantly black high school and affirmed a district court order that the closing was justified.[92] In a district with falling student populations, due in part to the departure of white students for private schools, the appeals court concluded that it was not unreasonable for the district to close a school with an enrollment in 1989-90 of fewer than 200 students. Assuming more whites do not leave the system, the closing also would increase integration in the remaining high school.

In 1987, the three dormant cases were reopened by an Alabama district court on its own motion for the purpose of holding hearings to determine if the three districts had achieved unitary status. Plaintiffs subsequently challenged the suggestion that the districts should be removed from court supervision. After the district court granted a summary judgment to the districts, appeals were carried to the Eleventh Circuit. In an opinion consolidating the three appeals, the appeals court held that the district court had improperly granted summary judgment when material issues of fact were in dispute.[93] In two of the districts, for example, estimates of the percentages of teachers who were from minority groups varied significantly. The cases were returned to the district court for hearings in each. Therefore this litigation, that neither the plaintiffs nor the defendants requested, will continue into the future.

In a second Alabama case, the Eleventh Circuit affirmed a lower court decision denying plaintiffs an opportunity to reopen a case that had been dismissed in 1985 after a finding that the district had achieved unitary status.[94] The appellants argued that the district court had authority to reopen the case because it never explicitly had dissolved the injunctions that had been issued against the district and because the district had failed to abide by outstanding court orders at the time the case was dissolved, as it had promised. The appeals court rejected the reopening, reminding the parties that they had stipulated to the case's dismissal. The court held that a joint stipulation contained none of the rights of enforcement associated with a formal settlement or consent decree.

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[90] Dowell v. Board of Educ. of Okla. City, 782 F. Supp. 574 (W.D. Okla. 1992).
[91] Lee v. Macon County Bd. of Educ., 970 F.2d 767 (11th Cir. 1992).
[92] Harris v. Crenshaw County Bd. of Educ., 968 F.2d 1090 (11th Cir. 1992).
[93] Lee v. Etowah County Bd. of Educ., 963 F.2d 1416 (11th Cir. 1992).

Plans by the Dallas school system to construct a "supermagnet" school had to be downsized when funds were not available to construct the original proposal. The district had intended to sell surplus property to obtain the funds, but a depressed real estate market in Dallas forced the change in plans. In reviewing the alternative plan, the district court concluded that the educational effectiveness of the proposed school could be retained at the lower funding level, so long as no further reductions were made.[95] The court set a firm date for the construction to commence, holding that the defendants would face sanctions of up to $20,000 per day for each day the deadline was exceeded.

Plaintiffs in the Dallas desegregation case challenged a decision made by school officials to move a successful Montessori magnet elementary school program and to reopen a traditional elementary school in its place. They noted that the 520-student Montessori school was completely integrated and argued successfully that the traditional school proposed to replace it would be segregated.[96]

Representatives of African-American students and of students with disabilities sought to have a district court invalidate a plan voluntarily adopted by a county school board because it placed a disproportionate burden on the two groups. The district court hearing the case concluded that the plan was adopted without any intent to discriminate.[97] While recognizing that a school closing that was a part of the plan was regrettable, the court found it actually impacted on a greater number of white than minority-group students. The court also refused to recognize that closing the school attended by a student with a disability was a change of placement.

State Court Cases

A lawsuit involving three New Jersey school districts, the state's education commissioner, and the state board was heard by an appeals court.[98] At issue was the decision by the commissioner, upheld by the board, that denied one of the districts the permission to sever a "sending-receiving" relationship between the districts. Such relationships are entered into by school districts that do not operate high schools. Under state law, racial composition may be used as a factor in reviewing such relationships. In the case at hand, one of the reasons the commissioner denied permission to sever the relationship was the loss of integration that would have resulted. In challenging the decision, the school district argued that using race as a factor was the equivalent of setting aside places in classes for members of minority groups, a practice prohibited by the Supreme Court.[99] The court disagreed, upholding the board's decision and rejecting the quota analysis offered by the district. In the case at hand, the court concluded, the state merely had used race as a factor in making the decision, an approach supported by the preponderance of Fourteenth Amendment law.

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[94] Lee v. Talladega County Bd. of Educ., 963 F.2d 1426 (11th Cir. 1992).

[95] Tasby v. Edwards, 807 F. Supp. 421 (N.D. Tex. 1992).

[96] Tasby v. Edwards, 799 F. Supp. 652 (N.D. Tex. 1992).

[97] Middlebrook v. School Dist. of the County of Knox, 805 F. Supp. 534 (E.D. Tenn. 1991).

Connecticut plaintiffs brought suit alleging that economic and racial segregation in the Hartford area denied students equal educational opportunity.[100] State defendants responded by seeking dismissal of the case because the wrongs the plaintiffs alleged were not the product of state action. The court refused to grant summary judgment to the defendants, holding the record was unclear on the role of the state in creating the educational systems about which the plaintiffs complained. The court added that it also was uncertain whether the state constitution required a particular substantive level of educational programming.

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[98] Englewood Cliffs v. Englewood, 608 A.2d 914 (N.J. Super. Ct. App. Div. 1992).

[99] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[100] Sheff v. O'Neill, 609 A.2d 1072 (Conn. Super. Ct. 1992).

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INDIVIDUALS WITH DISABILITIES

Allan G. Osborne, Jr.

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Introduction

Litigation over the rights of students and employees with disabilities continued at a significant pace in 1992 as it has for the past several years. As in past years much of the litigation involved procedural issues and contested placement decisions under the Individuals with Disabilities Education Act (IDEA).[1] A large number of cases dealt with recovery of attorney fees by parents who successfully contested school district decisions. Another issue that was frequently litigated concerned the question of whether students were being educated in the least restrictive environment as mandated by IDEA.

One of the more interesting issues to come before the courts in 1992 involved the provision of special education services to a student attending a parochial school.[2] The issue before the court was whether a student attending a parochial school could receive special education services on the premises of the sectarian facility. The United States Supreme Court has granted *certiorari* and the case should be heard sometime in 1993.[3]

Litigation concerning the rights of employees with disabilities in programs receiving federal funds also continued at a significant level under section 504 of the Rehabilitation Act.[4] In many of these cases employees or applicants for employment tried to show that they were otherwise qualified for particular positions and could perform the essential duties of the positions if provided with reasonable accommodations. For the first time a case was reported that was decided under the Americans with Disabilities Act.[5]

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[1] 20 U.S.C. § 1400 *et seq.* as amended by 104 Stat. 1103 (1990).

[2] Zobrest v. Catalina Foothills Sch. Dist., 963 F.2d 1190 (9th Cir. 1992).

[3] 61 U.S.L.W. 3219 (U.S. Oct. 6, 1992).

[4] 29 U.S.C. § 794.

[5] 42 U.S.C. §§ 12101 – 12213.

Entitlement to Services

The IDEA requires school districts to provide students with disabilities with a free appropriate public education (FAPE), consisting of any needed special education and related services.[6] However, it does not establish substantive standards by which those services can be judged to be adequate. The IDEA provides that the student is to be afforded specially designed instruction[7] in conformance with the student's Individualized Education Program (IEP).[8] The Supreme Court has held that a student with disabilities is entitled to personalized instruction with support services sufficient to permit the student to benefit from the education provided.[9] The lower courts have been cautioned not to impose their views of preferable educational methods on school districts;[10] however, frequently they are asked to determine what level of services is required to meet IDEA's minimum standards. Students attending private schools also are entitled to the benefits of IDEA.[11]

In a split decision, the Ninth Circuit Court of Appeals held that a profoundly deaf student attending a parochial school was not entitled to the provision of a sign language interpreter.[12] The court held that providing the interpreter on the premises of the parochial school would violate the establishment clause of the First Amendment since the interpreter would be conveying the religious message of the school along with the curricular content of the student's classes. The court found that denying the interpreter services would burden the parents' free exercise rights; but held that a compelling state interest, ensuring that the First Amendment was not violated, justified the imposition of that burden. The case is currently before the Supreme Court.

Two district courts, one in Alabama and one in Arizona, came to different results concerning the question of whether students unilaterally placed in private schools by their parents are entitled to related services. The Alabama court held that the school district was required to provide related services to a student with Down's Syndrome who attended a private pre-school program, but was not required to provide those services on the premises of the private school.[13] The Arizona court held that the school district was not required to pay for speech therapy services at an out-of-state private school.[14] The latter court held that the school district's obligation to make services available to students attending private schools did not equate to an obligation to pay for related services where the school district had an appropriate alternative.

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[6] 20 U.S.C. § 1401(18).

[7] 20 U.S.C. § 1401(16).

[8] 20 U.S.C. § 1401(18)(d).

[9] Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982).

[10] *Id.*

[11] 34 C.F.R. § 300.452.

[12] Zobrest v. Catalina Foothills Sch. Dist., 963 F.2d 1190 (9th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3219 (U.S. Oct. 5, 1992).

[13] Tribble v. Montgomery County Bd. of Educ., 798 F. Supp. 668 (M.D. Ala. 1992).

The Sixth Circuit Court of Appeals held that a student with a long history of abnormal behavior and academic failure was seriously emotionally disturbed and therefore eligible for services under IDEA.[15] Although the student had average intelligence, the court found that his history of academic failure, difficulty making and maintaining friendships, and inability to create normal social bonds qualified him for services.

The Federal Claims Court held that the state was responsible for providing a residential placement for a student who had a seizure disorder, hyperactivity, and mental retardation as a result of receiving a series of diphtheria, pertussis, and tetanus inoculations.[16] The student's parents had received a compensatory award under the National Childhood Vaccine Act,[17] but were denied their request for long-term residential care. The court held that the student was not entitled to have a residential placement provided under the Vaccine Act since those services were available under IDEA.

The Commonwealth Court of Pennsylvania held that a gifted student was not entitled to the protections of IDEA as that legislation was enacted for the benefit of students with disabilities.[18] The student's parent had sought reimbursement of legal expenses involved in a dispute with the school district over the proper program for the student.

Procedural Safeguards

The IDEA contains an elaborate system of due process safeguards to ensure that students with disabilities are properly identified, evaluated, and placed according to the Act's mandates.[19] The regulations promulgated under the Act state that the parents or guardian of a child with disabilities must be provided with the opportunity to participate in the development of the IEP for their child.[20] The Act's regulations also require school districts to obtain parental consent prior to evaluating the child or making an initial placement.[21] Once a student has been placed in special education, the school district must provide the parents with proper notice before initiating a change in placement.[22] Furthermore, an IEP must contain statements of the student's current educational performance, annual goals and short term objectives, the specific educational services to be provided, the extent to which the child can participate in general education, the date of initiation and duration of services, and evaluation criteria to determine if the objectives are being met.[23]

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[14] Dreher v. Amphitheater Unified Sch. Dist., 797 F. Supp. 753 (D. Ariz. 1992).

[15] Babb v. Knox County Sch. Sys., 965 F.2d 104 (6th Cir. 1992).

[16] Taylor v. Secretary of the Dep't of Health and Human Servs., 24 Cl. Ct. 433 (Cl. Ct. 1991).

[17] 42 U.S.C. § 300aa-1 *et seq.* (1988).

[18] Huldah A. v. Easton Area Sch. Dist., 601 A.2d 860 (Pa. Commw. Ct. 1992).

[19] 20 U.S.C. § 1415.

[20] 34 C.F.R. § 300.345.

[21] 34 C.F.R. § 300.504(b).

If the parents disagree with any of the school district's decisions regarding a proposed IEP or any aspect of a FAPE, they may request an impartial due process hearing.[24] Any party not satisfied with the final decision of the administrative proceedings may appeal to the state or federal courts;[25] however, all administrative remedies must be exhausted prior to resort to the courts unless it is futile to do so. While an administrative or judicial action is pending, the school district may not change the student's placement without parental consent[26] or a court order.[27]

The IDEA empowers the courts to review the record of the administrative proceedings, hear additional evidence, and "grant such relief as the court determines is appropriate" based on the preponderance of evidence standard.[28] However, judges have been cautioned not to substitute their views of proper educational methodology for that of competent school authorities.[29] The IDEA does not contain a statute of limitations for filing a lawsuit; therefore courts must borrow one from analogous state statutes.

Rights of Parents or Guardians

The district court for the District of Columbia held that a notice the school district had sent to parents informing them that they had fifteen days to request a due process hearing to challenge a placement decision was invalid.[30] The court ruled that neither IDEA nor its regulations imposed such a limitation and to send out such a misleading notice violated the parents' procedural rights.

In two other cases the same court found the District's notice to parents concerning placement and eligibility determinations to be sufficient. In one case the court held that the purpose of the notice is to provide parents with sufficient information to protect their rights under IDEA and to allow them to make an informed decision regarding the school district's proposals.[31] In the second case, the court held that a notice should provide the parents with sufficient information concerning where the school district proposed to place the child, and why that placement was chosen, so that the parents could draw an informed conclusion about whether the proposed placement would provide an appropriate education.[32] In each case the court found that the school district's notice contained the required information.

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[22] 20 U.S.C. § 1415(b)(1)(C).
[23] 20 U.S.C. § 1401(20).
[24] 20 U.S.C. § 1415(b)(2).
[25] 20 U.S.C. § 1415(e)(2).
[26] 20 U.S.C. § 1415(e)(3).
[27] Honig v. Doe, 484 U.S. 305 (1988).
[28] 20 U.S.C. § 1415(e)(2)(C).
[29] Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982).
[30] Smith v. Henson, 786 F. Supp. 43 (D.D.C. 1992).

The Connecticut district court held that a school district violated the rights of a student and his parents when it released their names to the local newspaper after a due process hearing.[33] The court found that the plaintiffs had an expectation of privacy based on IDEA and its procedural safeguards. Those safeguards prohibit the disclosure of any personally identifiable information and require school boards to protect the confidentiality of personally identifiable information.[34]

Development of Individualized Education Programs

The Ninth Circuit Court of Appeals upheld a district court decision that invalidated an IEP that had been developed by a school district without input from either the student's parents or representatives of the parochial school he attended. The appeals court held that procedural violations that result in the loss of educational opportunity, or seriously infringe on the parents' opportunity to participate in the formulation of the IEP, result in the denial of a FAPE.[35]

Public school district personnel are required to attend IEP meetings conducted by private schools according to the district court for the District of Columbia.[36] The court ruled that the school district's failure to do so rendered its proposed placement invalid. In a separate case that same court held that a parent's request for a due process hearing put the school district on notice that she was dissatisfied with the student's placement and that the school district was obligated to review and possibly revise the IEP.[37]

The First Circuit Court of Appeals held that it is permissible for one person to draft the IEP as long as the parents were not denied the opportunity to participate in its development and other members of the IEP team had the opportunity to provide input into its contents.[38] However, the district court in Connecticut held that school district personnel violated the IDEA when they proposed a placement without first evaluating the student or writing an IEP.[39] A Pennsylvania state court ruled that impromptu meetings between a student's mother and various school officials did not constitute a meeting of the IEP team and as a result, the mother did not participate in the development of the IEP as required by IDEA.[40] The court also found that the IEP as written did not meet IDEA's criteria as it lacked statements of the student's then present levels of functioning, an individualized behavior modification plan, objective assessment criteria, and time-lines to determine if goals were being achieved.

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[31] Kroot v. District of Columbia, 800 F. Supp. 976 (D.D.C. 1992).

[32] Smith v. Squillacote, 800 F. Supp. 993 (D.D.C. 1992). On remand from Jenkins v. Squillacote, 935 F.2d 303 (D.C. Cir. 1991). *See* THE YEARBOOK OF EDUCATION LAW 1992 at 92.

[33] Sean R. v. Board of Educ. of Woodbridge, 794 F. Supp. 467 (D. Conn. 1992).

[34] 34 C.F.R. §§ 300.571, 300.572.

[35] W.G. and B.G. v. Board of Trustees of Target Range Sch. Dist. No. 23, Missoula, Mont., 960 F.2d 1479 (9th Cir. 1992), *aff'g.* 789 F. Supp. 1079 (D. Mont. 1991).

[36] Smith v. Henson, 786 F. Supp. 43 (D.D.C. 1992).

[37] Edwards-White v. District of Columbia, 785 F. Supp. 1022 (D.D.C. 1992).

Change in Placement

The Fifth Circuit Court of Appeals held that IDEA's stay put provision did not limit or pre-empt the authority conferred on the courts by the Act.[41] The court found that the stay put provision limited school districts but not the courts. The court further held that when a magistrate judge ordered the transfer of a student from a state school to a community residence he did not alter her IEP but merely altered the location where it was to be implemented.

Administrative Hearings

Several cases in 1992 involved the question of whether litigants were required to exhaust all administrative remedies prior to resort to the courts. The Fifth Circuit Court of Appeals held that parents who filed suit protesting a school board's policy of limiting parents' rights to tape record IEP meetings must either exhaust their administrative remedies or show that it would be futile to do so.[42] The court held that the question was clearly a complaint subject to IDEA's due process mechanism.

The Ninth Circuit Court of Appeals held that exhaustion was still required in a class action suit challenging alleged policies concerning extended school year programs.[43] The court stated that the eligibility criteria and methodology questions at issue in the case were the very kinds of technical issues that are best resolved through agency expertise in the administrative process. The court further indicated that even where local education policies appear to violate IDEA, administrative exhaus-

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38. Hampton Sch. Dist. v. Dobrowolski, 976 F.2d 48 (1st Cir. 1992).
39. P.J. v. Connecticut Bd. of Educ., 788 F. Supp. 673 (D. Conn. 1992).
40. Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commw. Ct. 1992).
41. Sherri A.D. v. Kirby, 975 F.2d 193 (5th Cir. 1992).
42. Gardener v. School Bd. Caddo Parish, 958 F.2d 108 (5th Cir. 1992).
43. Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298 (9th Cir. 1992).

tion is necessary to allow the state the opportunity to investigate and correct those policies.

The federal district court for the District of Columbia held that having a court make an appropriateness determination as part of proceedings for a temporary restraining order would be an end-run around the process established by IDEA.[44] The court pointed to the school district's offer of an alternative placement as evidence that exhausting administrative remedies would not be futile.

A district court in Indiana held that parents seeking enforcement of an administrative decision must exhaust administrative remedies.[45] The court stated that when a school district ignores an administrative order the proper remedy is enforcement of that order; a remedy that was available through the administrative process created by state law.

The Second Circuit Court of Appeals ruled that exhaustion would have been futile for parents who challenged the method by which hearing officers were selected since neither a hearing officer nor even the Commissioner of Education had the authority to alter the procedure.[46] A federal district court in New York held that exhaustion would be futile for parents seeking reimbursement of tuition for a private school that was not approved by the state since a review officer was not permitted to order a placement at an unapproved facility.[47]

A Tennessee district court held that the attorney general was not required to exhaust administrative remedies under IDEA prior to bringing suit in federal court.[48] According to the court, only the parents or guardians of the students are required to exhaust administrative remedies.

The district court for New Hampshire held that hearing officers have the authority to award compensatory services.[49] The court stated that given the importance Congress placed on the administrative process, a hearing officer's authority to grant relief was coextensive with that of the court.

The Ninth Circuit Court of Appeals held that a hearing officer had jurisdiction over a case brought by parents contesting the school district's refusal to identify a student as disabled.[50] The school district had argued that since the student was not a special education student the hearing officer lacked jurisdiction; however, the court disagreed.

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[44] 44. Moss v. Smith, 794 F. Supp. 11 (D.D.C. 1992).

[45] 45. Norris v. Board of Educ. of Greenwood Community Sch. Corp., 797 F. Supp. 1452 (S.D. Ind. 1992).

[46] 46. Heldman v. Sobol, 962 F.2d 148 (2d Cir. 1992).

[47] 47. Straube v. Florida Union Free Sch. Dist., 778 F. Supp. 774 (S.D.N.Y. 1991); 801 F. Supp. 1164 (S.D.N.Y. 1992).

[48] 48. United States v. Tennessee, 798 F. Supp. 483 (W.D. Tenn. 1992).

[49] 49. Cocores v. Portsmouth, N.H. Sch. Dist., 779 F. Supp. 203 (D.N.H. 1991).

[50] 50. Hacienda La Puente Unified Sch. Dist. of Los Angeles v. Honig, 976 F.2d 487 (9th Cir. 1992).

The district court for the District of Columbia held that the District's own municipal regulations[51] placed the burden of proof on the school district in administrative hearings.[52] The court ruled that a hearing officer had improperly shifted the burden to the parents.

Court Proceedings

The federal appeals court for the District of Columbia held that the party challenging an administrative decision bears the burden of proof in court.[53] However, the district court in New Jersey held that when challenged a school district must show that its placement decisions satisfy the procedural and mainstreaming provisions of IDEA and ultimately must convince the court that the student cannot be educated within the regular classroom with supplementary aids and services.[54]

The Second Circuit Court of Appeals held that a case involving a student who was no longer enrolled in the public school was not moot since he was still eligible for special education services.[55] A district court in New York held that a case in which the plaintiffs claimed that the state did not offer a continuum of placement alternatives was not moot since the basic complaint continued to exist.[56] The Fifth Circuit Court of Appeals held that a case was moot where a school district had made a commitment to provide special education and related services if the student returned to the district.[57]

The Fourth Circuit Court of Appeals held that a district court should have accorded greater weight to a hearing officer's decision, rather than the reviewing officer's decision, since the hearing officer had heard a contested witness testify and the reviewing officer had not.[58] The reviewing officer found the testimony of the witness not to be credible. The court found that the reviewing officer's discrediting of the witness he had not seen or heard was so far removed from accepted fact-finding practice that no due weight should be accorded to his decision.

The Eighth Circuit Court of Appeals held that the implementation of a stipulation agreement did not divest the district court of jurisdiction to rule on claims made by the parents.[59] The appeals court found that resolution of those claims was necessary to resolve issues not addressed by the stipulation agreement.

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[51] 5 D.C.M.R. § 3022.16.

[52] Kroot v. District of Columbia, 800 F. Supp. 976 (D.D.C. 1992).

[53] Angevine v. Smith, 959 F.2d 292 (D.C. Cir. 1992). *See* THE YEARBOOK OF EDUCATION LAW 1992 at 97.

[54] Oberti v. Board of Educ. of the Borough of Clementon Sch. Dist., 789 F. Supp. 1322 (D.N.J. 1992); 801 F. Supp. 1392 (D.N.J. 1992).

[55] Heldman v. Sobol, 962 F.2d 148 (2d Cir. 1992).

[56] Straube v. Florida Union Free Sch. Dist., 801 F. Supp. 1164 (S.D.N.Y. 1992).

[57] Lee v. Biloxi Sch. Dist., 963 F.2d 837 (5th Cir. 1992).

[58] Doyle v. Arlington County Sch. Bd., 953 F.2d 100 (4th Cir. 1991).

[59] Koestser v. Wellsville-Middletown R-1 Sch. Dist., 960 F.2d 69 (8th Cir. 1992).

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Standing to Sue

The Second Circuit Court of Appeals held that the father of a student with disabilities who challenged the method by which independent hearing officers were selected had standing to sue.[60] The court ruled that the father had an enforceable right to an impartial hearing officer and thus had standing to challenge the method of selection, since his due process rights would have been denied if his allegations were true.

Statute of Limitations

The federal district court in Massachusetts held that the correct method of selecting an appropriate limitations period for filing a lawsuit under IDEA is to choose the most analogous state cause of action, unless it is inconsistent with the policies of the federal statute.[61] The court found that the state's thirty day statute of limitations governing appellate review of administrative proceedings was applicable to IDEA actions.[62] The court held that this limitations period was consistent with IDEA's goal of resolving disputes while a remedy is still available. An Indiana district court also held that the state's thirty day statute of limitations for judicial review of administrative decisions[63] was applicable since prompt resolution of disputes is necessary to insure students an appropriate education.[64]

A federal district court in Virginia held that the appropriate period of limitations for actions under IDEA in that state was one year.[65] Since the lawsuit had been filed three years after the plaintiffs learned of the event that was the basis of their claim, the court held that the action was time-barred.

In two separate decisions the district court in New Hampshire held that the limitations period begins to run on the date the administrative hearing decision is issued.[66] Plaintiffs had argued that it should begin on the date the decision was received, but the court felt that this would only lead to litigation concerning when a party received notification in the mail. In the latter case the court held that the statute of limitations could be applied retroactively. In another New Hampshire case the First Circuit Court of Appeals held that a lawsuit seeking compensatory services was not barred by laches because the parents' delay in filing their lawsuit was not unreasonable, since they were attempting to resolve their differences with the school district.[67]

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[60] Heldman v. Sobol, 962 F.2d 148 (2d Cir. 1992).

[61] Gertel v. School Comm. of Brookline Sch. Dist., 783 F. Supp. 701 (D. Mass. 1992).

[62] 30A M.G.L.A. § 14.

[63] Ind. Code § 4-21.5.5.5 (1990).

[64] Elizabeth K. v. Warrick County Sch. Corp., 795 F. Supp. 881 (S.D. Ind. 1992).

[65] Richards v. Fairfax County Sch. Bd., 798 F. Supp. 338 (E.D. Va. 1992).

[66] I.D. v. Westmoreland Sch. Dist., 788 F. Supp. 632 (D.N.H. 1991), *reh'g denied*, 788 F. Supp. 634 (D.N.H. 1992); G.D. v. Westmoreland Sch. Dist., 783 F. Supp. 1532 (D.N.H. 1992).

Actions Under Other Statutes

The federal district court in Connecticut held that the school district violated the plaintiffs' privacy rights when it released their names to a local newspaper following an administrative hearing.[68] According to the court, interference with those rights constituted a deprivation of the rights secured under 42 U.S.C. section 1983.

A district court in Tennessee held that the Attorney General of the United States had standing to sue under the Civil Rights of Institutionalized Persons Act[69] when the institutional conditions deprived residents of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.[70] The complaint alleged, *inter alia*, that residents under the age of twenty-two of a state institution for the mentally retarded were deprived of a FAPE under IDEA.

A Pennsylvania district court held that section 504 of the Rehabilitation Act did not provide the plaintiff with a cause of action, as IDEA was the exclusive avenue through which a student with disabilities may assert an equal protection claim to a publicly financed special education.[71] The court indicated that section 504 cannot be used to circumvent IDEA's administrative process.

Placement

The IDEA regulations require school districts to insure that a "continuum of alternative placements" exists to meet the needs of students with disabilities for special education and related services.[72] That continuum must range from placement in general education to a private residential facility and also must include homebound services. However, the placement chosen for any given student must be in the least restrictive environment (LRE) for that child and removal from general education can occur only to the extent necessary to provide special education and related services.[73] All placements must be made at public expense and must meet state educational standards.[74] Each placement must be reviewed at least annually and revised if necessary.[75] The Supreme Court

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67. Murphy v. Timberlane Regional Sch. Dist., 973 F.2d 13 (1st Cir. 1992).
68. Sean R. *ex rel.* Dwight R. v. Board of Educ. of Woodbridge, 794 F. Supp. 467 (D. Conn. 1992). *See* note 33 and accompanying text.
69. 42 U.S.C. § 1997 *et seq.*
70. United States v. Tennessee, 798 F. Supp. 483 (W.D. Tenn. 1992).
71. Gaudiello v. Delaware County Intermediate Unit, 796 F. Supp. 849 (E.D. Pa. 1992).
72. 34 C.F.R. § 300.551.
73. 34 C.F.R. § 300.550.
74. 20 U.S.C. § 1401(18).
75. 34 C.F.R. § 300.552(a)(1).

has held that an appropriate education is one that is developed in compliance with IDEA's procedures and is reasonably calculated to enable the child to receive educational benefits.[76] Although states must adopt policies and procedures that are consistent with IDEA, they may provide greater benefits than those required by the federal law. If a state does establish higher standards, courts will consider those standards when evaluating the appropriateness of the IEP.[77]

Appropriate Educational Placement

Throughout the history of IDEA courts have held that the term "appropriate" does not mean "best." The Court of Appeals for the District of Columbia held that IDEA only requires an appropriate education, not the best possible education.[78] In overturning the lower court's decision in favor of the parents' unilaterally chosen private school placement, the appeals court indicated that the district court may have been persuaded by testimony comparing a public program with a private program. The appeals court emphasized that the comparative question was not before the court. Similarly, the district court in Utah held that even though a medically fragile student placed on homebound instruction would likely receive greater benefit by attending school, the school district had met its obligation to provide the basic floor of opportunity through the home-bound program.[79] The court found that evidence indicated that the student was receiving some educational benefit through the home-bound program.

However, other courts have held that in order to be appropriate, an educational program must confer more than just minimal benefit. A district court in Georgia held that in order to further the purposes of IDEA, a proposed placement must confer some appreciable educational benefit upon the student.[80] The court found that a program in which a student had made little progress in four years was not appropriate. A Mississippi district court upheld a proposed public school placement after finding that the student had received meaningful educational benefit from it.[81] A New York district court held that a school district's proposed IEP, which called for a continuation of the same program the student had been in for several years, was not appropriate, as the student's progress had not been sufficient to indicate that he was receiving the educational opportunity to which he was entitled.[82] The Fourth Circuit Court of Appeals held that an IEP with a goal of four months progress during an academic year was unlikely to allow the student to advance from grade to grade with passing marks, and thus was not appropriate.[83] A state court in Pennsylvania ruled that an IEP that was not individualized was not appropriate, even though it was designed to confer some educational benefit.[84]

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[76] Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982).

[77] *See e.g.*, David D. v. Dartmouth Sch. Comm., 775 F.2d 411 (1st Cir. 1985); Geis v. Board of Educ. of Parsippany-Troy Hills, Morris County, 774 F.2d 575 (3d Cir. 1985). *See* THE YEARBOOK OF SCHOOL LAW 1986 at 131.

[78] Angevine v. Smith, 959 F.2d 292 (D.C. Cir. 1992). *See* THE YEARBOOK OF EDUCATION LAW 1992 at 97.

[79] Granite Sch. Dist. v. Shannon M., 787 F. Supp. 1020 (D. Utah 1992).

[80] Chris C. v. Gwinnett County Sch. Dist., 780 F. Supp. 804 (N.D. Ga. 1991).

[81] Livingston v. DeSoto County Sch. Dist., 782 F. Supp. 1173 (N.D. Miss. 1992).

The district court in Connecticut held that a preschool program chosen by a four-year-old student's parents was not appropriate, as it was not staffed by professionals who could deliver the special education and related services the child needed.[85] The teachers staffing the program in question were not certified in special education. The First Circuit Court of Appeals held that there was sufficient evidence to uphold the district court's finding that a proposed IEP was appropriate.[86] The appeals court found evidence that the student had progressed in the public school program, that any failure experienced by the student was due to his own lack of motivation and failure to complete homework assignments, that services were to be increased in the new IEP, and that the methods and level of services proposed were similar to those proposed for other students in similar circumstances.

In a lawsuit challenging the state's system of educating its disabled students, a district court in Pennsylvania held that it is the state's responsibility to ensure that the systems it puts into place are working and, if not, to correct them. The court ultimately held the state responsible for a system that severely restricted the availability of adequate placements, resulting in students being placed for long periods of time in inappropriate and potentially harmful settings.[87] In a New York case, the parents of a learning disabled student claimed that the state failed to offer a continuum of placement alternatives after placing their child in a private school that was not on the state's approved list of special education facilities. The court, however, found that the state offered a sufficient continuum of placement alternatives.[88] The court held that an appropriate education was one that would advance the child academically, not necessarily one that would guarantee college entrance. Thus the court found that the parents' rejection of a program that had a vocational focus was unreasonable and that a placement in an approved facility could have been obtained.

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[82] Straube v. Florida Union Free Sch. Dist., 801 F. Supp. 1164 (S.D.N.Y. 1992).
[83] Carter v. Florence County Sch. Dist. Four, 950 F.2d 156 (4th Cir. 1991).
[84] Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commw. Ct. 1992).
[85] P.J. v. Connecticut Bd. of Educ., 788 F. Supp. 673 (D. Conn. 1992).
[86] Hampton Sch. Dist. v. Dobrowolski, 976 F.2d 48 (1st Cir. 1992).
[87] Cordero v. Pennsylvania Dep't of Educ., 795 F. Supp. 1352 (M.D. Pa. 1992).
[88] Straube v. Florida Union Free Sch. Dist., 801 F. Supp. 1164 (S.D.N.Y. 1992); *see also* 778 F. Supp. 774 (S.D.N.Y. 1991).

Several proposed IEPs were challenged on procedural grounds. Whether the school district's procedural violations are fatal depends on the degree to which they ultimately effect the development of the student's IEP. The district court in Montana held that a school district failed to offer an appropriate education since the IEP it proposed was developed without input from the student's parents or representatives of the parochial school he attended. The Ninth Circuit Court of Appeals affirmed, holding that procedural flaws that result in the loss of educational opportunity, or seriously infringe on the parents' opportunity to participate in the formulation of the IEP, result in a denial of an appropriate education.[89] The district court for the District of Columbia held that the failure of school district personnel to attend an IEP meeting conducted at the private school the student had been attending rendered the district's proposed IEP invalid.[90] The district court in Connecticut held that a school district's proposed placement was not appropriate since it made the proposal without first evaluating the student or writing an IEP.[91]

A Mississippi district court held that although the school district had committed several procedural errors in developing a student's IEP, none was severe enough to warrant reversal of a hearing officer's decision that he had been given an appropriate education.[92] The student's mother had challenged the district's failure to inform her of her right to a due process hearing, the adequacy of notices sent to her, and the fact that the district had presented a draft IEP at the placement conference. The First Circuit Court of Appeals held that procedural flaws alleged by the parents were not sufficient to set aside the school district's IEP.[93] The court found that the alleged procedural violations did not prevent the parents from participating in the IEP process.

Least Restrictive Environment

The IDEA's least restrictive environment mandate was the subject of much litigation during the past year. The Fourth Circuit Court of Appeals held that the Act's preference for mainstreaming did not justify a school district's IEP or make its proposal superior to that of a private school program preferred by the parents.[94] The court stated that mainstreaming is to be pursued as long as it is consistent with the law's primary goal of providing students with an appropriate education. A district court in Utah held that a medically fragile student could not be satisfactorily mainstreamed due to the student's need for the full-time care of a nurse.[95]

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[89] W.G. and B.G. v. Board of Trustees of Target Range Sch. Dist. No. 23, Missoula, Mont., 789 F. Supp. 1070 (D. Mont. 1991), *aff'd*, 960 F.2d 1479 (9th Cir. 1992).

[90] Smith v. Henson, 786 F. Supp. 43 (D.D.C. 1992).

[91] P.J. v. Connecticut Bd. of Educ., 788 F. Supp. 673 (D. Conn. 1992).

[92] Livingston v. DeSoto County Sch. Dist., 782 F. Supp. 1173 (N.D. Miss. 1992).

[93] Hampton Sch. Dist. v. Dobrowolski, 976 F.2d 48 (1st Cir. 1992).

[94] Carter v. Florence County Sch. Dist. Four, 950 F.2d 156 (4th Cir. 1991).

The Eleventh Circuit Court of Appeals affirmed a district court's order to place a student with Down's Syndrome in a general education classroom with supplementary aids and services.[96] The court held that before a school district can determine that a child should be educated outside the general education classroom, it must consider whether supplemental aids and services would allow satisfactory education within the general education environment. The court further indicated that a complete range of supplemental aids and services must be considered. In its opinion the court listed several factors that must be considered when placement decisions are made, including: academic benefits, nonacademic benefits, the effect on other students in the classroom, and the cost of the supplemental aids and services. That decision was later withdrawn after one member of the appeals panel raised a jurisdictional issue but was reinstated when that issue was resolved.[97]

A California district court held that IDEA's presumption in favor of mainstreaming requires placement in a general education classroom if the student can receive a satisfactory education there, even if it is not the best academic setting for the student.[98] That court also indicated that nonacademic factors, detriment to other students, and costs are factors to be considered in placement decisions. The district court in Connecticut held that a school district's proposal to place a preschool aged child in an environment that was not fully integrated was unfounded.[99] The court did not find any evidence that indicated that the child would be disruptive or that her disability was of such severity that she would not benefit from full integration.

An Alabama district court held that the state's continuum of placement options indicated that a public residential facility was less restrictive than a private one.[100] Since the state operated facility offered an appropriate education and was less restrictive, the court held that it was the appropriate placement.

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[95] Granite Sch. Dist. v. Shannon M., 787 F. Supp. 1020 (D. Utah 1992).

[96] Greer v. Rome City Sch. Dist., 950 F.2d 688 (11th Cir. 1991). *See* THE YEARBOOK OF EDUCATION LAW 1992 at 98.

[97] Greer v. Rome City Sch. Dist., 956 F.2d 1025 (11th Cir. 1992), 967 F.2d 470 (11th Cir. 1992).

[98] Board of Educ., Sacramento City Unified Sch. Dist. v. Holland, 786 F. Supp. 874 (E.D. Cal. 1992).

[99] P.J. v. Connecticut Bd. of Educ., 788 F. Supp. 673 (D. Conn. 1992).

[100] Mark Z. v. Mountain Brook Bd. of Educ., 792 F. Supp. 1228 (N.D. Ala. 1992).

The federal district court in New Jersey held that a segregated special education class was not the least restrictive environment for a student with Down's Syndrome.[101] The court found that IDEA imposed an affirmative obligation on school districts to consider placing students with disabilities in general education classrooms with the use of supplementary aids and services before exploring other alternatives, and that opportunities for mainstreaming must be maximized to meet the goals of the Act. The court's opinion stated that the preference for mainstreaming can be rebutted only by showing that the student's disabilities are so severe that little or no benefit will be received from inclusion in the classroom, that the student is so disruptive that the education of other students will be impaired, or that the cost of providing supplementary services will have a negative effect on programs for other students. However, the court indicated that school districts must supplement and realign their resources to move beyond the systems, structures, and practices that tend to unnecessarily segregate students with disabilities. In a subsequent decision in the same case, the court held that the need to modify the curriculum is not a legitimate basis to justify exclusion of a student with disabilities from general education.[102] The court emphasized that inclusion is a right, not a privilege for a select few.

The Fifth Circuit Court of Appeals held that even in cases in which mainstreaming is not feasible, there is a statutory preference for educating individuals with disabilities in a setting that is least restrictive of their liberty and which is near the community of their residence.[103] The court approved a magistrate judge's order directing the transfer of the student to a community residence and requiring the local school district to educate her, stating that the order tracked the intent of IDEA.

Private Facilities

A district court in New York held that school districts must consider placement in a private facility when education within the public school system is not effective.[104] An Alabama district court approved a placement in a state operated residential facility for a student who had failed to make progress in a psycho-educational program after finding that the public facility would offer an appropriate education and was less restrictive than a similar private residential facility.[105]

The federal district court in New Jersey held that if a residential placement is necessary for educational reasons, the school district may be required to pay the total costs of that placement.[106] In a 1990 case that was only recently released for publication, a federal district court in Tennessee held that since the residential component of a placement was educationally necessary, the state and local school district were responsible for the residential costs, and the student's social security allowance could not be used to fund the placement. The court also held that a group home cannot be considered an appropriate educational placement.[107]

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[101] Oberti v. Board of Educ. of the Borough of Clementon Sch. Dist., 789 F. Supp. 1322 (D.N.J. 1992).

[102] *Id.* 801 F. Supp. 1393 (D.N.J. 1992).

[103] Sherri A.D. v. Kirby, 975 F.2d 193 (5th Cir. 1992).

[104] Straube v. Florida Union Free Sch. Dist., 801 F. Supp. 1164 (S.D.N.Y. 1992).

[105] Mark Z. v. Mountain Brook Bd. of Educ., 792 F. Supp. 1228 (N.D. Ala. 1992).

Related Services

The IDEA requires school districts to provide related, or supportive, services to students with disabilities if such services are needed to assist the students in benefitting from their special education program.[108] The Act specifically mentions such developmental, supportive, and corrective services as transportation, speech pathology, audiology, psychological services, physical therapy, occupational therapy, recreation (including therapeutic recreation and social work services), counseling services (including rehabilitation counseling), medical services (for diagnostic or evaluative purposes only), and early identification and assessment as related services.[109] The Supreme Court has held that related services need be provided only to students receiving special education, and only those services that are necessary for the child to benefit from special education must be incorporated into the IEP.[110] The only limitation placed on what could be considered a related service is that medical services are exempted unless they are specifically for diagnostic or evaluative purposes.

A question often arises concerning whether school districts are required to provide or pay for related services for students attending private schools. The answer depends on the particular circumstances of the situation. The district court in Arizona held that the school district was not required to reimburse parents for speech therapy services at an out-of-state private school where the parents had unilaterally placed the student.[111] The court found that the school district's obligation to make services available to students attending private schools[112] did not equate to an obligation to pay for related services where the school district had an appropriate alternative that was rejected by the parents. An Alabama district court held that IDEA requires that when parents place their child in a private school or program, the school district remains responsible for providing the student with related services.[113] However, the court indicated that the school district is not required to make those services available to the student in the private school setting.

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[106] Woods v. New Jersey Dep't of Educ., 796 F. Supp. 767 (D.N.J. 1992).

[107] McClain v. Smith, 793 F. Supp. 756 (E.D. Tenn. 1989); 793 F. Supp. 761 (E.D. Tenn. 1990).

[108] 20 U.S.C. § 1401(a)(17).

[109] *Id.*

[110] Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883 (1984).

[111] Dreher v. Amphitheater Unified Sch. Dist., 797 F. Supp. 753 (D. Ariz. 1992).

[112] 34 C.F.R. §§ 300.451 and 300.452.

The federal district court in Utah held that the extensive nursing services required by a student who suffered from congenital neuromuscular atrophy and severe scoliosis fell within the medical exclusion of IDEA's related services requirement.[114] The court distinguished this case from *Tatro*, noting that the student in *Tatro* did not require constant nursing.

Remedies

If a school district fails to provide an appropriate placement for a student with disabilities, the courts are empowered to grant such relief as they determine to be appropriate.[115] The relief granted frequently involves reimbursement of costs borne by the parents in unilaterally obtaining appropriate services for the child. The Supreme Court has ruled that school districts may be required to reimburse parents for costs incurred in providing their child with special education and related services if they prevail in having their chosen placement deemed appropriate.[116] Awards of compensatory education services have been made in situations where the parents did not have the financial means to obtain private services while the litigation was pending.

In 1986 Congress passed the Handicapped Children's Protection Act to allow parents who prevail in a lawsuit pursuant to IDEA to recover their legal expenses.[117] In 1990 Congress passed legislation to specifically abrogate the states' Eleventh Amendment immunity to lawsuits in the federal courts for any actions that occurred after October 30, 1990.[118] These amendments to the federal special education law were passed in response to Supreme Court rulings that the Act did not allow for recovery of attorney fees by prevailing parents[119] and did not specifically abrogate the states' sovereign immunity.[120]

Tuition Reimbursement

The Supreme Court's *Burlington* decision indicates that parents may be reimbursed for tuition and other costs associated with unilaterally obtained services if the courts determine that the school district failed to

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113. Tribble v. Montgomery County Bd. of Educ., 798 F. Supp. 668 (M.D. Ala. 1992).
114. Granite Sch. Dist. v. Shannon M., 787 F. Supp. 1020 (D. Utah 1992).
115. 20 U.S.C. § 1415(e)(2)(1).
116. Burlington Sch. Comm. v. Massachusetts Dep't of Educ., 471 U.S. 359 (1985).
117. 20 U.S.C. § 1414(e)(4)(B) *et seq.*
118. 20 U.S.C. § 1403.
119. Smith v. Robinson, 468 U.S. 992 (1984).
120. Dellmuth v. Muth, 491 U.S. 223 (1989).

provide an appropriate education and the parents' chosen placement was appropriate. However, it is not clear if reimbursement can be awarded if the parents' placement was in a facility that was not approved by the state. The Fourth Circuit Court of Appeals held that reimbursement was not barred for a facility that was not state-approved and that did not fully comply with the terms of IDEA.[121] The court found that when a school district has defaulted on its obligations a parental placement in a private facility is proper and that IDEA does not forbid reimbursement if that facility is not state-approved, as long as the education it provides meets the *Rowley* standards. However, a district court in New York held that it could not order placement in or tuition reimbursement for an unapproved facility, even if the placement was appropriate.[122] However, the court did award reimbursement of the cost of counseling the parents obtained privately after the school district failed to provide counseling called for in the student's IEP.

The Sixth Circuit Court of Appeals held that parents, who had placed their emotionally disturbed child in a private hospital that included an educational component, were entitled to be reimbursed for the educational costs of the child's placement, including the costs of psychological and related services.[123] The court ruled that IDEA allows for placement of emotionally disturbed students in hospitals and institutions when necessary and that the school district had deprived the student of a FAPE by failing to determine that he had a disability.

The Ninth Circuit Court of Appeals affirmed the district court's award of tuition reimbursement for privately obtained tutoring after determining that the school district's IEP was not appropriate.[124] A District of Columbia court awarded tuition reimbursement after finding that the school district had failed to conduct an annual review of a student's IEP as required by IDEA.[125] A New York state appeals court held that the Commissioner of Education has the authority to order reimbursement of tuition and other costs associated with a unilateral placement.[126]

The district court in Connecticut denied an award of reimbursement even though it had determined that the school district failed to propose an appropriate placement.[127] The court also found that the parents' chosen placement was inappropriate and thus a reimbursement award was not warranted. A Mississippi district court denied reimbursement after determining that the school district's proposed IEP was appropriate.[128] The Arizona district court also denied reimbursement for speech therapy services provided at a unilaterally chosen private school, after determining that the school district had provided the student with an opportunity to receive an appropriate education at a public school.[129]

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[121] Carter v. Florence County Sch. Dist. Four, 950 F.2d 156 (4th Cir. 1991).

[122] Straube v. Florida Union Free Sch. Dist., 778 F. Supp. 774 (S.D.N.Y. 1991), 801 F. Supp. 1164 (S.D.N.Y. 1992).

[123] Babb v. Knox County Sch. Sys., 965 F.2d 104 (6th Cir. 1992).

[124] W.G. and B.G. v. Board of Trustees of Target Range Sch. Dist. No. 23, Missoula, Mont., 789 F. Supp. 1070 (D. Mont. 1991), *aff'd*, 960 F.2d 1479 (9th Cir. 1992).

[125] Edwards-White v. District of Columbia, 785 F. Supp. 1022 (D.D.C. 1992).

[126] Northeast Cent. Sch. Dist. v. Sobol, 584 N.Y.S.2d 525 (N.Y. 1992). *See* THE YEARBOOK OF EDUCATION LAW 1992 at 103 & 107.

[127] P.J. v. Connecticut Bd. of Educ., 788 F. Supp. 673 (D. Conn. 1992).

Compensatory Services

Compensatory services may be awarded as a remedy to compensate students for a violation of their rights under IDEA according to a ruling by the Commonwealth Court of Pennsylvania.[130] The court viewed an award of compensatory services as being similar to an award of tuition reimbursement in that it belatedly requires the school district to provide the services it should have provided all along. Generally a student's eligibility for services under IDEA ends when the student reaches the age of twenty-one.[131] The district court in New Hampshire held that the fact that the student had passed the age of eligibility was not a bar to an award of compensatory services under IDEA.[132] A New York district court granted an award of compensatory educational services for the year following a student's graduation to compensate for services he had been denied in the past.[133] Although the student would receive those services while attending college, the court held that compensatory services in the form of college tuition could not be granted.

Attorney Fees

Much of the attorney fees litigation focuses on whether the parents are in fact the prevailing party. The Sixth Circuit Court of Appeals held that the parents were entitled to attorney fees even though they did not receive the relief sought, a residential placement, since they had succeeded in gaining additional therapy services for their child.[134] The court ruled that since the legal relationship between the parties had changed, the parents were the prevailing party. The federal district court in the District of Columbia held that parents were the prevailing party since their lawsuit prompted the school district to take action enabling them to obtain an appropriate placement prior to the start of the school

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128. Livingston v. DeSoto County Sch. Dist., 782 F. Supp. 1173 (N.D. Miss. 1992).
129. Dreher v. Amphitheater Unified Sch. Dist., 797 F. Supp. 753 (D. Ariz. 1992).
130. Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commw. Ct. 1992).
131. 20 U.S.C. § 1412(2)(B).
132. Cocores v. Portsmouth, N.H. Sch. Dist., 779 F. Supp. 203 (D.N.H. 1991).
133. Straube v. Florida Union Free Sch. Dist., 801 F. Supp. 1164 (S.D.N.Y. 1992).
134. Krichinsky v. Knox County Schs., 963 F.2d 847 (6th Cir. 1992).

year.[135] The District of Columbia district court also held that parents who had obtained a tuition reimbursement award were entitled to attorney fees as the prevailing party.[136] The Court of Appeals of New York held that an award of attorney fees to prevailing parents was appropriate unless it could be shown that special circumstances existed to make such an award unjust.[137]

The Third Circuit Court of Appeals held that parents who had not prevailed on any of their claims were not the prevailing party.[138] A Mississippi district court held that although two issues before a hearing officer were decided in the parents' favor, they were not the prevailing party since the student never returned to the public school placement which had been declared appropriate.[139] The court found that since the student never returned to the public schools the legal relationship between the parties did not change.

A Michigan district court not only held that the parents were not the prevailing party, but also stated that their attorney unnecessarily aggrandized and protracted the misunderstanding between the parties.[140] The plan ultimately agreed on by the parties was far less favorable than the one originally proposed by the school district. The Rhode Island district court also denied attorney fees after determining that the final relief obtained by the parents was not more favorable than a settlement offer made by the school district.[141] That court also criticized the parents for failing to make a good faith attempt at settlement and for being utterly inflexible regarding settlement. The district court in Maine granted a partial award of attorney fees to parents who did not achieve their ultimate goal but did succeed in gaining an increase in services.[142] However, the court denied reimbursement of attorney fees for legal representation at the IEP meeting stating that allowing recovery of legal fees for those meetings would only encourage adversarial conduct. The Eighth Circuit Court of Appeals denied an award of attorney fees to parents who had filed a due process complaint without giving the school district an opportunity to voluntarily alter the child's placement.[143]

A federal district court in Ohio approved a full award of attorney fees and costs to parents who had not prevailed on every issue after find-

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135. Aranow v. District of Columbia, 780 F. Supp. 46 (D.D.C. 1992), *amended*, 791 F. Supp. 318 (D.D.C. 1992).
136. Edwards—White v. District of Columbia, 785 F. Supp. 1022 (D.D.C. 1992).
137. Northeast Cent. Sch. Dist. v. Sobol, 584 N.Y.S.2d 525 (N.Y. 1992). *See* THE YEARBOOK OF EDUCATION LAW 1992 at 103 & 107.
138. Wheeler v. Towanda Area Sch. Dist., 950 F.2d 128 (3d Cir. 1991).
139. Livingston v. DeSoto County Sch. Dist., 782 F. Supp. 1173 (N.D. Miss. 1992).
140. Fischer v. Rochester Community Schs., 780 F. Supp. 1142 (E.D. Mich. 1991).
141. Mr. L. and Mrs. L. v. Woonsocket Educ. Dep't, 793 F. Supp. 41 (D.R.I. 1992).
142. Fenneman v. Gorham, 802 F. Supp. 543 (D. Me. 1992).
143. Johnson v. Bismarck Pub. Sch. Dist., 949 F.2d 1000 (8th Cir. 1991).

ing that the matters before the administrative hearings were intertwined and could not be viewed as a series of separate claims.[144] That court also found that unusual circumstances existed in this litigation to warrant a departure from case law in the Sixth Circuit that limits billable hours for attorney fees recovery petitions to 3% to 5% of the time spent litigating the main case.[145] The unusual circumstances in this case were that the presiding judge in the fees recovery litigation was not familiar with the case, and what should have been a simple fees litigation was turned into a second major litigation by the actions of the school district and its counsel.

The District of Columbia district court held that prevailing parents were entitled to be reimbursed for miscellaneous expenses that were incurred by their attorneys and billed as part of their fees.[146] Initially, the court ruled that they were not entitled to reimbursement for expert advisory services or an expert that did not testify before the court; however, the court later amended its decision to allow for reimbursement of the expert's fees.

The District of Columbia district court held that attorney fees reimbursement is available to plaintiffs who must come to the district court to enforce the decision of a hearing officer.[147] In a separate action that same court held that attorney fees reimbursement is not barred by the Eleventh Amendment.[148] The Ninth Circuit Court of Appeals held that a claim for reimbursement of attorney fees was not subject to the requirements of the California Tort Claims Act.[149]

State Immunity

A federal district court in New York held that the IDEA amendment abrogating the states' Eleventh Amendment immunity applied to violations that occurred, at least in part, after October 30, 1990, but that states were immune to suit for actions that occurred prior to that date.[150] The court also held that claims for prospective relief were not barred by the Eleventh Amendment. The district court for the District of Columbia ruled that the decision in *Dellmuth* precluded an award of tuition reimbursement, but not attorney fees, and was not a bar to reimbursement of attorney fees in the case.[151] The court also indicated that an award of attorney fees was prospective relief that was not barred by the Eleventh Amendment.

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[144] Moore v. Crestwood Local Sch. Dist., 804 F. Supp. 960 (N.D. Ohio 1992).

[145] Coulter v. Tennessee, 805 F.2d 146 (6th Cir. 1986).

[146] Aranow v. District of Columbia, 780 F. Supp. 46 (D.D.C. 1992), *amended*, 791 F. Supp. 318 (D.D.C. 1992).

[147] Capiello v. District of Columbia, 779 F. Supp. 1 (D.D.C. 1991).

[148] Cousin v. District of Columbia, 142 F.R.D. 574 (D.D.C. 1992).

[149] Hacienda La Puente Unified Sch. Dist. of Los Angeles v. Honig, 976 F.2d 487 (9th Cir. 1992); (citing WEST'S ANN. CAL. GOV. CODE § 905).

[150] Straube v. Florida Union Free Sch. Dist., 778 F. Supp. 774 (S.D.N.Y. 1991); 801 F. Supp. 1164 (S.D.N.Y. 1992).

[151] Cousin v. District of Columbia, 142 F.R.D. 574 (D.D.C. 1992).

Other IDEA Issues

The Seventh Circuit Court of Appeals held that a letter issued by the Assistant Secretary for the Office of Special Education and Rehabilitative Services (OSERS) was an interpretive rule that did not trigger the notice and comment requirements of the Administrative Procedures Act.[152] The court held that the letter simply stated what OSERS thought IDEA required and was not a substantive rule or regulation that imposed a new and mandatory duty upon school districts.[153]

The United States Claims Court held that a damage award under the Vaccine Act did not need to be offset for any services the student received under IDEA.[154] The court found that the services provided by the school district may be inadequate to meet the tremendous needs of a student who suffered neurological damage as a result of the administration of the D.P.T. vaccine.

The district court in New Jersey ruled that an indigent parent who was proceeding *in forma pauperis* pursuant to the provisions of 28 U.S.C. section 1915 was entitled to a written transcript of the administrative proceedings at federal expense.[155] The court found that a written transcript of the testimony and evidence was an essential tool for the effective and efficient review of the administrative determination, and that providing such a transcript at federal expense comported with federal law.[156]

State Laws

Special Education is governed by state law as well as federal law. Each state's special education statutes must be consistent with IDEA; however, differences do exist. Most states have legislation similar in scope to IDEA, but several states have requirements that go beyond IDEA's provisions. Some states have higher standards of what constitutes an appropriate education and/or stricter procedural requirements. In other instances state laws establish procedures for special education program implementation that are not explicitly covered by federal law.

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[152] 5 U.S.C. § 553.

[153] Metropolitan Sch. Dist. of Wayne Township, Marion County v. Davila, 969 F.2d 485 (7th Cir. 1992), *rev'g* 770 F. Supp. 1331 (S.D. Ind. 1991). *See* THE YEARBOOK OF EDUCATION LAW 1992 at 106.

[154] 23 Cl. Ct. 352 (Cl. Ct. 1991).

[155] Militello v. Board of Educ. of Union City, 803 F. Supp. 974 (D.N.J. 1992).

[156] 28 U.S.C. § 753(f).

Federal and state courts frequently are called upon to interpret those provisions.

New York

A New York trial court held that a state law creating a school district for the purpose of providing special education services to parochial school students violated the establishment clauses of the United States and New York constitutions.[157] The court found that the statute had a sectarian purpose, was enacted to advance, protect, and foster the religious beliefs of the community, and fostered excessive government entanglement with religion.

A state appellate court held that the Family Court, not the Commissioner of Education, was vested with the authority to set tuition rates for students with disabilities under the age of three.[158] The Court of Appeals of New York ruled that the Commissioner had the authority to modify a school district's determination regarding a special education program for a student, and thus had the authority to make his decision regarding placement retroactive by awarding tuition reimbursement.[159]

Pennsylvania

The Commonwealth Court dismissed the petition of thirteen school districts challenging the Department of Education's cap on excess costs of special education.[160] The court dismissed for failure to exhaust administrative remedies, finding that the administrative procedures available to the school districts were adequate and capable of providing review of the department's actions. The Commonwealth Court also held that a student classified as mentally gifted also could be classified as learning disabled.[161] The court found that state law defined learning disability as a severe discrepancy between achievement and intellectual ability. Additionally, the Commonwealth Court denied an application for summary relief in a lawsuit challenging the Secretary of Education's memorandum which indicated that the special education plans of school districts whose special education class sizes exceeded the limits set out in the regulations would be approved.[162] The court found that material issues of fact were in dispute. In another case, the Commonwealth Court held that Pennsylvania's scheme to implement IDEA makes the administrative appeals panel the ultimate fact finder in special education disputes and empowers it to grant appropriate relief such as awards of compensatory services.[163]

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[157] Grumet v. New York State Educ. Dep't, 579 N.Y.S.2d 1004 (Sup. Ct. 1992).

[158] United Cerebral Palsy of New York City, Inc. v. Sobol, 582 N.Y.S.2d 558 (App. Div. 1992).

[159] Northeast Cent. Sch. Dist. v. Sobol, 584 N.Y.S.2d 525 (N.Y. 1992). *See* THE YEARBOOK OF EDUCATION LAW 1992 at 103 & 107.

[160] Colonial Sch. Dist. v. Commonwealth, 602 A.2d 455 (Pa. Commw. Ct. 1992).

[161] Conrad Weiser Area Sch. Dist. v. Department of Educ., 603 A.2d 701 (Pa. Commw. Ct. 1992).

[162] Pennsylvania Protection & Advocacy, Inc. v. Department of Educ., 609 A.2d 909 (Pa. Commw. Ct. 1992).

Massachusetts

The Supreme Judicial Court held that the state's special education law did not allow a judge in a "child in need of services" proceeding to determine whether a student required special education and then order a placement.[164] The court held that a judge may only refer the student to the proper local school authorities to determine the student's need for special education.

Illinois

An appellate court held that a school district may reveal the contents of a student's records to attorneys representing the district in court proceedings challenging a special education placement, since the district has the right to be represented by counsel.[165] The court also held that the student records law was not violated by the release of student records to the court in connection with an appeal of an administrative decision since the court must review those records. However, the court indicated that the school district was required to give the parents prior written notice of such release.

Florida

A District Court of Appeals held that state law allowed an aggrieved party in a special education dispute to appeal an administrative decision to either the circuit (trial) court or appellate court.[166] The court indicated that if the party elects to take the case to the circuit court it will receive *de novo* review; however, if the party elects to bypass the circuit court and proceed directly to the appellate court, the case will receive traditional appellate review.

Ohio

The Court of Appeals held that the state statute requiring school districts to identify students with disabilities did not expressly impose any liability on the district for negligence in the performance of this duty.[167] The parents of a student with epilepsy had sued the school district for failing to identify their son as disabled.

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[163] Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commw. Ct. 1992).

[164] Oscar F. v. County of Worcester, 587 N.E.2d 208 (Mass. 1992).

[165] Aufox v. Board of Educ. of Township High Sch. Dist. No. 113, 167 Ill. Dec. 675, 588 N.E.2d 316 (Ill. App. Ct. 1992).

[166] District Sch. Bd. of Putnam County v. Roderick, 593 So. 2d 1174 (Fla. Dist. Ct. App. 1992).

Missouri

The Supreme Court of Missouri held that a $3 million set-aside allocation was not a reallocation from other uses of the school foundation program funds and was consistent with a previously enacted statute that mandated funds for a preschool program be provided separate from the foundation program.[168] However, the court affirmed a trial court's injunction prohibiting the state from requiring school districts to provide special education services to disabled three and four-year-olds, until the legislature provided a specific appropriation to fund the portion of the program not federally funded.

North Dakota

The Supreme Court of North Dakota held that a student who attended a state school for hearing impaired students was a resident of the district where her father resided, not the district where she resided with her sister and mother.[169] The student's mother had moved to the Devil's Lake School District where the state school was located so that the student could attend the facility. However, the father continued to maintain the family's residence in the former community. The court also held that the state statute governing boarding care did not state that natural parents could not provide reimbursable boarding care for their child, when special education services were required outside of the child's home district.

Discrimination Under the Rehabilitation Act, Section 504

Section 504 of the Rehabilitation Act of 1973, as amended, provides that "[n]o otherwise qualified individual with handicaps . . . shall, solely by reason of his or her handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance. . . ."[170] Section 504 effectively prohibits any recipient of federal funds from discriminating against individuals with disabilities in the provision of services or employment. Section 504 applies to any agency that receives federal funds, not just the schools. For that reason this section includes several selected cases that did not arise in a school context, but contain legal principles that are applicable to educational programs and institutions.

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[167] Zellman v. Kenston Bd. of Educ., 593 N.E.2d 392 (Ohio Ct. App. 1991).

[168] Rolla 31 Sch. Dist. v. State, 837 S.W.2d 1 (Mo. 1992).

[169] Lapp v. Reeder Pub. Sch. Dist. No. 3, 491 N.W.2d 65 (N.D. 1992).

[170] 29 U.S.C. § 794.

A person is considered to have handicaps under section 504 if the person has a physical or mental impairment that substantially limits one or more of the person's major life activities, has a record of such an impairment, or is regarded as having such an impairment.[171] Major life activities are "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[172] The Supreme Court has held that a person is otherwise qualified for purposes of section 504 if the person is capable of meeting all of a program's requirements in spite of the handicap.[173] If a person is otherwise qualified, a recipient of federal funds is expected to make reasonable accommodations for the person's disabilities, unless doing so would create an undue hardship.[174]

Students

Elementary and Secondary. Students with disabilities at the elementary and secondary level have rights under section 504 as well as IDEA. Often students and their parents file lawsuits that state claims under both statutes. Frequently the claims stated under one statute are identical or similar to the claims stated under the other statute; however, sometimes distinct claims are stated only under section 504.

The district court for New Hampshire held that a learning disability is considered to be a physical or mental impairment under section 504, and thus a student with a learning disability would be a handicapped person under that Act.[175] The court further held that the student's complaint, that he had been denied an appropriate education because he had not been provided with an IEP that adequately addressed his learning disability, stated a claim under section 504.

A district court in Pennsylvania, however, held that IDEA is the exclusive avenue through which a student with disabilities may assert an equal protection claim to a publicly financed special education, and thus section 504 did not provide a cause of action.[176] The student's parents had bypassed IDEA's administrative scheme and instead filed this section 504 action; however, the court held that IDEA's administrative

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171. 29 U.S.C. § 706(7)(B).
172. 34 C.F.R. § 104.3(j)(2)(ii).
173. School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987); Southeastern Community College v. Davis, 442 U.S. 397 (1979).
174. 34 C.F.R. § 104.12(a).
175. I.D. v. Westmoreland Sch. Dist., 788 F. Supp. 634 (D.N.H. 1992).
176. Gaudiello v. Delaware County Intermediate Unit, 796 F. Supp. 849 (E.D. Pa. 1992).

appeals process provided the proper forum for review of any decisions concerning the student's education.

The federal district court in New Jersey held that a school district violated section 504 by failing to investigate and provide the reasonable accommodations that would enable a student with Down's Syndrome to benefit from an education in a regular classroom setting.[177] The court also held that the student's exclusion from regular education, solely on the basis of his disability, violated section 504.

Higher Education. The First Circuit Court of Appeals held that a medical school had undertaken a diligent assessment of testing options and that school officials had made the professional judgment that reasonable accommodations to their testing format could not be made without imposing a hardship on the academic program.[178] The court further held that by offering remedial measures to assist a student who had dyslexia with course work, the university had made a reasonable accommodation and was not required to alter its testing format. The student had filed the lawsuit after failing several courses, claiming that the university discriminated against him by not offering alternatives to their multiple choice testing format. The appeals court had previously remanded the case to the district court after finding that the record before it was incomplete.[179]

A Missouri district court held that a dental student with the HIV virus who had been dismissed from a university failed to show that he was otherwise qualified.[180] The student had been dismissed from the program after the university's communicable diseases council found that he should not be allowed to engage in any invasive procedures, as the risk of transmission to patients during such procedures was too great. The court held that the university's decision to dismiss the student was an academic one and was not based on any stereotypes or prejudices about individuals with HIV.

A state appeals court in New York held that the clear language and legislative history of the Rehabilitation Act indicated that the state's commission for the blind was required to provide rehabilitation services designed to enable an applicant for services to reach her highest achievable vocational goal.[181] The student had applied for sponsorship under the Act to attend college and law school but the commission denied her request.

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[177] Oberti v. Board of Educ. of the Borough of Clementon Sch. Dist., 801 F. Supp. 1392 (D.N.J. 1992).

[178] Wynne v. Tufts Univ. Sch. of Medicine, 976 F.2d 791 (1st Cir. 1992).

[179] Wynne v. Tufts Univ. Sch. of Medicine, 932 F.2d 19 (1st Cir. 1991). *See* THE YEARBOOK OF EDUCATION LAW 1992 at 110 & 182.

[180] Doe v. Washington Univ., 780 F. Supp. 628 (E.D. Mo. 1991).

[181] Polkabla v. Commission for the Blind and Visually Handicapped of the N.Y. State Dep't of Social Servs., 583 N.Y.S.2d 464 (App. Div. 1992).

Employees

Discrimination Claims. The Second Circuit Court of Appeals held that the termination of an employee because of excessive absenteeism caused by alcoholism was a termination solely by reason of the employee's handicap.[182] The court determined that conduct that is associated with, or is a manifestation of a handicap, is relevant in termination decisions. Similarly, the district court in Nevada held that an employer relies on a handicap if termination is based on conduct that is caused by the handicap.[183] Since drunk driving is causally connected to alcoholism, the court held that the state's reassignment of an employee following a drunk driving conviction was based on his handicap. However, the District of Columbia court upheld the termination of a government employee who had been convicted of vehicular homicide, following involvement in a fatal accident while driving an agency vehicle while intoxicated.[184] The court held that the employee was dismissed because of criminal conduct, not his alleged alcoholism.

The Sixth Circuit Court of Appeals upheld the dismissal of a postal employee who had not revealed information about physical disabilities on his employment application.[185] The postmaster had indicated that the employee never would have been hired if this information had been known. The court held that the employee was not entitled to handicap discrimination relief since he was not initially qualified for the position. The district court in the District of Columbia held that a Department of Education employee was not promoted because of his inadequate performance and that his deficiencies were due to causes that were not related to the department's alleged lack of accommodation.[186] The Eighth Circuit Court of Appeals upheld the dismissal of an employee who had refused to work in a laboratory situation because of claimed allergies.[187] The court found that the employee failed to establish that any serious risk of harm would result from her exposure to chemicals in the laboratory.

The Tenth Circuit Court of Appeals upheld the district court's dismissal of discrimination claims of an applicant who was denied a position as a fire fighter because he had decreased sensation in two fingers.[188] The court held that the applicant was not a handicapped person under section 504 because the decreased sensation did not substantially limit major life activities. The court ruled that an impairment that an employ-

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182. Teahan v. Metro-North Commuter R.R. Co., 951 F.2d 511 (2d Cir. 1991).
183. Ham v. Nevada, 788 F. Supp. 455 (D. Nev. 1992).
184. Wilber v. Brady, 780 F. Supp. 837 (D.D.C. 1992).
185. Dotson v. United States Postal Serv., 977 F.2d 976 (6th Cir. 1992).
186. Adrain v. Alexander, 792 F. Supp. 124 (D.D.C. 1992).
187. Maulding v. Sullivan, 961 F.2d 694 (8th Cir. 1992).
188. Welsh v. City of Tulsa, Okla., 977 F.2d 1415 (10th Cir. 1992).

er perceived as limiting an individual's ability to perform only one job was not a handicap. The District of Columbia district court upheld the discrimination claims of an applicant with the HIV virus who was denied a fire fighter position due to his illness.[189] The court found that there was no measurable risk of the applicant transmitting HIV to other fire fighters or the general public in the performance of his duties and that he met all other prerequisites for the position.

The federal district court in Rhode Island upheld the discrimination claims of an applicant who was denied employment because of her obesity.[190] The court found that obesity was a physiological condition qualifying as a handicap in that it limits a person's ability to work and thus interferes with a major life activity. A district court in Ohio found that an applicant for a postal service position was a handicapped person because the postal service regarded her history of musculoskeletal injuries as a physical impairment that substantially limited her ability to work.[191] The postal service considered her history of injuries as a bar to employment, even though physicians concluded that she was medically qualified for the position.

Otherwise Qualified Individuals with Disabilities. The Second Circuit Court of Appeals held that an applicant for a position with the postal service who was limited in his ability to do heavy lifting was not otherwise qualified since he was unable to perform the essential functions of the position.[192] A district court in Michigan also held that a postal service employee who was unable to carry out the physical requirements of her position after she had been assaulted by a customer was not otherwise qualified.[193] The Second Circuit Court of Appeals held that a former head nurse who could not work the specific shift required of head nurses due to an illness and medication regimen, was not otherwise qualified, since she could not fulfill the justified requirements of the position.[194]

The First Circuit Court of Appeals held that a postal service employee who was arrested for possession of heroin with intent to distribute was not otherwise qualified, since the postal service prohibits its employees from engaging in criminal conduct.[195] The Second Circuit Court of Appeals ruled that even though substance abuse is a handicap under section 504, substance abusers whose current abuse prevents them from performing the duties of their jobs[196] are excluded from the protections of the Act.[197]

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[189] Doe v. District of Columbia, 796 F. Supp. 559 (D.D.C. 1992).

[190] Cook v. Rhode Island, Dep't of Mental Health, 783 F. Supp. 1569 (D.R.I. 1992).

[191] Scharff v. Frank, 791 F. Supp. 182 (S.D. Ohio 1991).

[192] Gilbert v. Frank, 949 F.2d 637 (2d Cir. 1991).

[193] Montgomery v. Frank, 796 F. Supp. 1062 (E.D. Mich. 1992).

[194] Guice-Mills v. Derwinski, 967 F.2d 794 (2d Cir. 1992).

[195] Taub v. Frank, 957 F.2d 8 (1st Cir. 1992).

The district court for the District of Columbia held that an applicant for the position of fire fighter was otherwise qualified due to the fact that he had met all of the prerequisites for the position and was able to show that there was no measurable risk of his transmitting the HIV virus during the performance of his duties.[198] The applicant had been informed that he had been approved for the position but was denied it after he disclosed his HIV status.

Reasonable Accommodation. A district court in Virginia held that allowing an applicant for a teaching certificate an unlimited amount of time to take the communications portion of the National Teachers Examination would not be a reasonable accommodation, because a similar accommodation could not be made in a teaching position.[199] The teacher had failed the test in question eight times and had even failed it after some limited accommodations had been made. The court also determined that the skills measured by the examination are necessary for competent performance as a classroom teacher and that waiving the testing requirement was not a reasonable accommodation.[200]

The Second Circuit Court of Appeals ruled that requiring other workers to perform the heavy lifting, carrying, and pushing tasks of a postal worker's job was not a reasonable accommodation, since that was not a reasonable way for the postal service to operate.[201] Similarly, a district court in Texas held that an employer was not required to create a new position or accommodate an employee by eliminating essential aspects of her former position in the postal service.[202] The district court in Nebraska held that assigning additional drivers to vans was the only accommodation that could be made for drivers with disabilities that would ensure the safety of their passengers, but that the cost of that accommodation was unreasonable.[203]

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[196] 29 U.S.C. § 706(8)(C)(v) provides that "the term 'individual with handicaps' does not include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others."

[197] Teahan v. Metro-North Commuter R.R. Co., 951 F.2d 511 (2d Cir. 1991).

[198] Doe v. District of Columbia, 796 F. Supp. 559 (D.D.C. 1992).

[199] Pandazides v. Virginia Bd. of Educ., 804 F. Supp. 794 (E.D. Va. 1992).

[200] *See* Pandazides v. Virginia Bd. of Educ., 752 F. Supp. 696 (E.D. Va. 1990), *rev'd and remanded*, 946 F.2d 345 (4th Cir. 1991); THE YEARBOOK OF EDUCATION LAW 1992 at 9, 111, & 112.

[201] Gilbert v. Frank, 949 F.2d 637 (2d Cir. 1991).

[202] Alexander v. Frank, 777 F. Supp. 516 (N.D. Tex. 1991).

[203] Wood v. School Dist. of Omaha, 784 F. Supp. 1441 (D. Neb. 1992).

An offer of an alternative position with no significant reduction in salary and benefits is a reasonable accommodation, according to a ruling by the Second Circuit Court of Appeals.[204] The district court for the District of Columbia held that a federal agency reasonably accommodated an alcoholic employee by affording him an adequate opportunity to obtain treatment.[205] The court stated that the agency could not be faulted for the employee's failure to embark on a meaningful treatment program.

The federal district court in Rhode Island held that an employer did not make a reasonable accommodation by agreeing to hire an applicant if she reduced her weight to 300 pounds or less.[206] A district court in Washington held that an employee who was able to carry out the essential functions of her position, but was forced to resign as a result of ridicule and taunting by her co-workers, could have been reasonably accommodated.[207] The court found that the employee's supervisor had not made any attempts to suppress the taunting and had subjected the employee to inappropriate discipline. The District of Columbia Court of Appeals reversed in part a lower court decision that an employee with multiple sclerosis who had requested permission to work at home had failed to show that working at home was the only reasonable accommodation.[208] The appeals court found that there was a genuine issue about whether the employee could perform the essential functions of her position with the accommodation she sought and whether granting the accommodation would place an undue hardship on her employer.

Other Section 504 Issues

The Ninth Circuit Court of Appeals held that a plaintiff lacks standing to challenge a rule or policy that he has not submitted himself to by actually applying for the desired benefit.[209] The plaintiff had filed suit claiming a university discriminated against handicapped students by not offering free handicapped parking permits, but had never applied for such a permit. The university took remedial action on its own following an investigation by the Office of Civil Rights.

The Second Circuit Court of Appeals affirmed a lower court decision that held that the applicable statute of limitations for section 504 lawsuits in Vermont was the state's three-year limitations period for personal injury actions.[210] A Virginia district court also held that the appropriate limitations period in that state for section 504 actions was Virginia's two-year statute of limitations on claims to an injury to a person.[211] In a separate action that same court held that the limitations period for filing a lawsuit contesting a student's graduation began on the day of the graduation and that the plaintiffs' ignorance of their right to sue did not prevent the limitations period from running.[212] The Fifth Circuit Court of Appeals also held that discrimination claims under section 504 are most analogous to personal injury claims and thus held that Texas' two-year statute of limitations for personal injury lawsuits was applicable.[213] The court also held that the applicable statute provided that the limitations period is not tolled while the plaintiff is under the age of eighteen and, therefore, did not begin to run until the plaintiff turned eighteen.

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[204] Guice-Mills v. Derwinski, 967 F.2d 794 (2d Cir. 1992).

[205] Gallagher v. Catto, 778 F. Supp. 570 (D.D.C. 1991).

[206] Cook v. Rhode Island, Dep't of Mental Health, 783 F. Supp. 1569 (D.R.I. 1992).

[207] Kent *ex rel.* Gillespie v. Derwinski, 790 F. Supp. 1032 (E.D. Wash. 1992).

[208] Langon v. United States Dep't of Health and Human Servs., 749 F. Supp. 1 (D.D.C. 1990), *aff'd in part, rev'd in part*, 959 F.2d 1053 (D.C. Cir. 1992). *See* THE YEARBOOK OF EDUCATION LAW 1991 at 117.

[209] Madsen v. Boise State Univ., 976 F.2d 1219 (9th Cir. 1992).

The Eleventh Circuit Court of Appeals held that plaintiffs who proceed under a theory of disparate treatment in section 504 actions must prove intentional discrimination or bad faith in order to recover damages.[214] The court also held that the district court's failure to instruct the jury on the duty of reasonable accommodation was not so important that it seriously impaired the plaintiff's ability to present her case. The federal district court in the District of Columbia awarded back pay and $25,000 in compensatory damages to an applicant for a fire fighter position. The applicant was denied employment because of his positive HIV status.[215]

In a case involving a teacher who claimed to have an allergy to a fungus found in many environments, the Seventh Circuit Court of Appeals held that the district court had properly refused plaintiff's motion to direct the verdict, as the record indicated that there was a genuine dispute throughout the trial on all the elements required to be established under section 504.[216] The district court had entered judgment for the Board of Education on a jury verdict and had denied plaintiff's request for a directed verdict and a new trial.

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[210] Morse v. University of Vt., 776 F. Supp. 844 (D. Vt. 1991), *aff'd*, 973 F.2d 122 (2d Cir. 1992). *See* THE YEARBOOK OF EDUCATION LAW 1992 at 114.

[211] Wolsky v. Eastern Virginia Medical Auth., 795 F. Supp. 171 (E.D. Va. 1992).

[212] Richards v. Fairfax County Sch. Bd., 798 F. Supp. 338 (E.D. Va. 1992).

[213] Hickey v. Irving Indep. Sch. Dist., 976 F.2d 980 (5th Cir. 1992).

[214] Wood v. President and Trustees of Spring Hill College, 978 F.2d 1214 (11th Cir. 1992).

[215] Doe v. District of Columbia, 796 F. Supp. 559 (D.D.C. 1992).

[216] Byrne v. Board of Educ., Sch. of West Allis–West Milwaukee, 979 F.2d 560 (7th Cir. 1992).

Americans with Disabilities Act

The Americans with Disabilities Act (ADA),[217] which was enacted in 1990, is designed to prohibit discrimination against persons with disabilities in a wide range of activities sponsored by private as well as public entities. The ADA's greatest impact is on the private sector; however, since many of its provisions are similar in scope to those of section 504, lawsuits filed under the ADA should interest consumers of education law. Generally, compliance with section 504 will result in compliance with the ADA; however, several provisions of the ADA addressed loopholes in section 504 and codified judicial interpretations of the Rehabilitation Act. Starting this year, selected court decisions under the ADA that may interest education law practitioners will be reported in this chapter even if they did not arise in a school situation.

A district court in Arizona issued a temporary restraining order prohibiting Little League Baseball from enforcing a policy prohibiting a coach in a wheelchair from being on the field.[218] The court held that to determine whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment that relies on current medical knowledge, or on the best available objective evidence, to ascertain the nature, duration, and severity of the risk, the probability that the potential injury will occur, and whether reasonable accommodations would mitigate the risk. Since there was no indication that the Little League conducted such an assessment, the court held that their policy fell far short of the requirements of the ADA. The court gave great weight to the fact that the plaintiff had served as a first and third base coach for three years without incident.

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[217] P.L. 101-336, 104 STAT. 327 *et seq.* (1990) (Codified at 42 U.S.C. § 12101 *et seq.*)

[218] Anderson v. Little League Baseball, Inc., 794 F. Supp. 342 (D. Ariz. 1992).

5

TORTS

William J. Evans, Jr.

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Introduction

This chapter examines cases reported during 1992 which involved tort claims within the school context. Included are cases involving school officials, school employees, students, and others who were visiting school grounds. Excluded are cases arising out of interscholastic sports, which are covered in another chapter.

Negligence

In cases alleging negligence, the behavior of school personnel is measured against what a reasonable and prudent professional of similar training and experience would have done, or should have done, in the same or similar circumstances. The first two cases examined involve broad policy related actions in which the state or school district produced a successful defense.

Students who had allegedly been molested brought an action against the state of California and a local school district after the state provided credentials to a teacher who had allegedly been convicted of a prior sex offense.[1] The statute in question[2] was not found to have created a private cause of action for failure to deny credentials. Therefore, the state's alleged breach of duty could not provide a basis for civil liability.

The mother of a seven-year-old Louisiana child received notice from the school board that the child was required to have a Diphtheria-Pertussis-Tetanus (DPT) booster in order to continue in school. Less than a month after the vaccine was administered, the child suffered a stroke. Suit against the school district and manufacturer resulted in a verdict for the defendants.[3] Although the district required the administration of the vaccine, no causal connection was found between the vaccine and the injury suffered by the child.

Injuries

Schools bear the responsibility for maintaining safe and healthy environments in which learning can take place. The following cases are divided into categories according to where or how injury was sustained, and where the defense advanced was not a claim of sovereign or statutory immunity.

Off School Property and After School Hours. The father of a Louisiana student was injured in an incident involving the student's bus driver. In the father's action against the driver and school district, there was virtually total disagreement between the defendant's and plaintiff's versions of how the father was injured. A jury verdict found no liability on the part of the driver or school district. The father's appeal was unsuccessful with the court holding that, in the absence of manifest error, a jury has the right to decide between two views of the evidence.[4]

Parents of an eleven-year-old boy who was struck by a baseball while playing outside of school, failed in their attempt to hold the New York school district negligent.[5] The boy was determined to have assumed the risk of being struck when he walked between two friends playing catch.

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[1] State v. Superior Court, 10 Cal. Rptr.2d 527 (Ct. App. 1992).

[2] CAL. EDUC. CODE, § 44346, subdivision (a)(2).

[3] Toon v. Lederle Lab., 603 So. 2d 245 (La. Ct. App. 1992).

[4] Dugas v. Frederick, 594 So. 2d 1372 (La. Ct. App. 1992).

A fourth-grade Indiana student injured a younger child while practicing swinging a golf club at home. The student had received instruction in safe use of the club at school and had been allowed to take the club home. The parents of the child were unsuccessful in their action against the school and teacher.[6] The court found no duty owed to the student when the accident occurred. The activity was not supervised by the school or its officials, and furnishing the club did not effect a duty. Since the parents were unable to show that the school or teacher had specific knowledge of the student's incapability to use care in practicing with the club, the claim of negligent entrustment also failed.

An Arizona high school student was injured in an automobile accident while returning from a state sponsored youth conference. The classmate driving the car fell asleep, initiating the accident. The schedule at the conference had kept students busy from early morning to midnight each day. In considering the student's action against the state, the court found it reasonable to conclude that failure to provide students with adequate rest time constituted a failure to conform to the required standard of care.[7]

Another Arizona student was injured off school property in an automobile. A traffic accident occurred after the student became angry with his teacher and left the school with a classmate. In his action against the school district, the student alleged that the open campus policy of allowing students to leave during classroom hours exposed him to the risk of roadway accidents. Although the court found it foreseeable that mobile high school students could be exposed to such risks, not every foreseeable risk is unreasonable. With that analysis, the court held that the school district was not negligent.[8]

During an apparent robbery attempt, a Florida student was shot as he tried to drive out of a school's parking lot following an evening football game. School board policy was being violated at the time of the shooting as the required security guard was not on duty. In defense of the student's action for damages, the school board claimed that the shooting actually took place a few feet off of school property. Finding for the student, the court held that the board's duty to maintain the parking area in a safe condition did not end merely because the actual injury occurred a few feet beyond its property line.[9]

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[5] Osborne v. Olean Bd. of Educ., 588 N.Y.S.2d 489 (App. Div. 1992).

[6] Brewster v. Rankins, 600 N.E.2d 154 (Ind. Ct. App. 1992).

[7] Bishop v. State Dep't of Corrections, 837 P.2d 1207 (Ariz. Ct. App. 1992).

[8] Rogers v. Retrum, 825 P.2d 20 (Ariz. Ct. App. 1991).

[9] Gutierrez v. Dade County Sch. Bd., 604 So. 2d 852 (Fla. Ct. App. 1992).

A New York student was injured while on a school-sponsored ski trip in Massachusetts. Following dismissal of an action for damages against the ski facility, an action was brought against the school. As the issue of negligence by the ski facility was seen as vital to the second suit, the court found that the earlier dismissal prevented relitigation.[10]

An emotionally handicapped high school student was taken from her Florida school by other students. While off school grounds she was raped by five of the students. The action for damages brought against the school board by her parents resulted in summary judgment for the school board. That decision was reversed on appeal.[11] The court found issues of material fact as to whether the school had breached its duty to adequately supervise students.

A New York teacher volunteered to work at a baseball card show at her school. When she observed a little girl regurgitating near the door to the boy's locker room, she stationed a police officer near the location, and took the child with her family to the locker room. Approximately ten minutes later, she was called to attend to an adult who had slipped and fallen in other regurgitation about fifty feet from the first location. The adult's action for damages against the school district was unsuccessful. The court found that the ten minute existence of an allegedly hazardous condition was insufficient to charge the district with constructive notice.[12]

A California student was standing outside his high school when members of a neighborhood gang surrounded and forced him into the street where he was shot. His action against the school district alleged negligent supervision. The court found for the district rejecting a rigid interpretation of the concept of foreseeability. The school had taken a variety of precautions to minimize gang-related problems. In light of all the circumstances, the district was not found to have reason to foresee the gang-related shooting.[13]

School Settings During School Hours. Through her mother, a tenth-grade Georgia student brought an action to recover for a teacher's seduction. Judgment for the teacher was appealed. The court affirmed the portion of the decision which held that only a parent had standing to bring the suit. However, the case was remanded for further action as virtue (virginity) was not found an element necessary in a tort of seduction. Furthermore, the tort did not include a requirement that the seduction be accomplished through false and fraudulent means.[14]

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[10] Gibbons v. Averill Park Sch. Dist., 586 N.Y.S.2d 374 (App. Div. 1992).
[11] Doe v. Escambia County Sch. Bd., 599 So. 2d 226 (Fla. Ct. App. 1992).
[12] Post v. Valley Cent. Sch. Dist., 580 N.Y.S.2d 532 (App. Div. 1992).
[13] Brownell v. Los Angeles Unified Sch. Dist., 5 Cal. Rptr.2d 756 (Ct. App. 1992).
[14] Franklin v. Hill, 417 S.E.2d 721 (Ga. Ct. App. 1992).

Parents of school children and one school employee brought an action against an Arkansas school district, school employees, and past and present school board members for outrage, negligence, and civil rights violations resulting from violations of asbestos safety regulations. The trial court dismissed all counts of the complaint and the plaintiffs appealed.[15] The decision on the count of outrage was reversed. The school officials were found to have been purposefully deceitful as to the condition of asbestos in order not to disrupt school routine. The finding on negligence was also reversed as a state employee can be held liable for tortious acts to the extent of coverage by liability insurance. The dismissal of the civil rights claim was upheld as there were no written or official policies to evidence a "custom" of dealing improperly with asbestos.

A Louisiana student was violently struck by a classmate as he was walking to class. In the student's action against the school board, the trial court found a breach of duty to the injured student. The basis for the court's decision was that the student who caused the injury had a propensity for violence and yet was allowed to remain in the school unmonitored and uncounseled. That decision was reversed on appeal. The student who caused the injury had been in one prior fight. That incident resulted in the student's suspension and a warning concerning his future behavior. There was nothing in the record to indicate the first incident should have put the school on notice of future violent behavior.[16]

A Georgia junior high school student failed to show negligent supervision on the part of his principal and school board regarding injuries he sustained during recess. A classmate had picked him up and thrown him down on a concrete patio. Although there was evidence of prior fights at the school, those had been in a grassy area. Furthermore, the students were friends and the injured student had no knowledge of violent tendencies on the part of his classmate.[17]

The death of a second-grade student resulted in an action for wrongful death against the assistant principal of an Alabama school.[18] The child was killed when a gate which swung in front of the van in which he was a passenger pierced through the vehicle impaling him. The court failed to find substantial evidence that the school administrator was negligent before the accident. He had found the gate locked and did not know who used it last before the accident.

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[15] Deitsch v. Tillery, 833 S.W.2d 760 (Ark. 1992).

[16] Coleman v. Joyner, 593 So. 2d 451 (La. Ct. App. 1992). *See* Ceglia v. Portledge Sch., 590 N.Y.S.2d 228 (App. Div. 1992). School was not the insurer of a child's safety in an incident where a student was tripped by another student.

[17] Watts v. Wayne County Bd. of Educ., 412 S.E.2d 541 (Ga. Ct. App. 1991).

[18] Cason v. Oliver, 604 So. 2d 760 (Ala. 1992).

A Texas statute which made it a misdemeanor to knowingly fail to report the belief that a child has been abused was found not unconstitutionally vague as it applied to a kindergarten teacher.[19] The teacher was found to have cause to believe that a child was being abused when two aides put his hand under hot water making the child scream and the hand blister.

The assistant principal of an Arkansas middle school paddled three fifth-grade students who had been caught smoking in violation of school rules. The parent of one child contacted the County Division of Child Services, whose caseworker substantiated an allegation of child abuse. The administrator sought judicial review of a decision by the Department of Human Resources placing his name on the state's central registry of alleged child abusers for excessive corporal punishment. In finding for the assistant principal, the court cited testimony by the caseworker that the paddling was not excessive and that the allegation of abuse was based solely on a departmental guideline on the evidence of bruising. Stating that one factor alone should not be used as a litmus test, the court held that a consideration of all the attendant circumstances is appropriate. Based on this standard, no credible evidence to support an allegation of abuse was found.[20]

A Louisiana elementary school student was hit with a belt by his teacher. While she claimed the incident was accidental, the nature of the injuries to the student's head and shoulders negated that interpretation. The action for damages against the teacher and school resulted in a verdict for the student. On appeal the court upheld the general damages monetary award, but denied an award for loss of consortium based on the child's nightmares, fears, and epileptic seizures. Testimony failed to show a conclusive relationship between the onset of the child's epilepsy and the beating. Additionally, given that the teacher's actions were intended to discipline the student, not cause bodily harm, the school board and its insurer were responsible for defending the teacher in the action.[21]

Parents of a Texas student brought suit on behalf of the child for injuries she sustained in chemistry class. In finding for the teacher and school nurse, the court found the applicable statute permitted actions only in circumstances involving use of excessive force or negligence in disciplining a student.[22]

A nine-year-old child was injured in an explosion during a summer program chemistry class for gifted and talented students. The child and his parents brought suit against the District of Columbia and the school. The accident occurred while students were attempting to make "sparklers" using a highly volatile chemical. Finding for the parents and child, the court held the teacher was an independent contractor performing inherently dangerous work of which the District had actual or constructive knowledge. However, an award for future medical expenses was denied as this aspect of the case rested on speculation.[23]

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[19] Morris v. State, 833 S.W.2d 624 (Tex. Ct. App. 1992).

[20] Department of Human Serv. v. Caldwell, 832 S.W.2d 510 (Ark. Ct. App. 1992).

[21] Haley v. McManus, 593 So. 2d 1339 (La. Ct. App. 1992).

[22] Duross v. Freeman, 831 S.W.2d 354 (Tex. Ct. App. 1992).

A seven-year-old California student suffered second-degree burns when he spilled cafeteria food on himself. A decision for the school district was reversed on appeal.[24] The court found it reasonably foreseeable that a child in close proximity to other children, and with minimal supervision could be injured by food spilling. Furthermore, simply serving the food at a lower temperature would prevent this harm.

A jury determined that the injury and infection of a fourth-grade Illinois student's leg was caused by a failure of the school to properly maintain the door. This was despite the testimony of a student that he had closed the door on the girl's leg in jest. The court reversed the decision and remanded the case on the basis of a failure to instruct the jury it could find the intentional acts of another student as the sole cause of the injury.[25]

A New York high school student was injured when glass hit his eye after a fellow student struck a glass panel in an auditorium door with his fist. The jury verdict was set aside as the testimony by the student's expert witness was found too speculative to support the verdict against the school.[26]

On a day when bad weather necessitated classes staying indoors for a noon recess period, a sixth-grade New York student was injured when a classmate pulled his chair out from under him. At the time of the accident, the student was in one of two sixth-grade classes being supervised by a single aide who would move between the classrooms. Finding that the school was not liable for the accident, the court determined the accident to be a result of a sudden and unexpected prank, which could not have been anticipated or prevented.[27]

A Washington high school student brought an action against his school district and teacher following his sexual contact with the school's librarian. Absent evidence that it knew or had reason to know of the librarian's potential for misconduct, the court held that the district was not liable. Although the teacher had been told of an earlier occasion of possible misconduct by the librarian, without supervisory authority, he had no duty to report allegations to school officials.[28]

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[23] District of Columbia v. Howell, 607 A.2d 501 (D.C. App. Ct. 1992).
[24] Espinosa v. Fresino Unified Sch. Dist., 7 Cal. Rptr.2d 346 (Ct. App. 1992).
[25] McCall v. Chicago Bd. of Educ., 593 N.E.2d 621 (Ill. Ct. App. 1992).
[26] Skipper v. City of New York, 589 N.Y.S.2d 21 (App. Div. 1992).
[27] Tomlinson v. Board of Educ. of Elmira, 583 N.Y.S.2d 664 (App. Div. 1992).

The decision by a South Carolina trial court to dismiss a student's negligence action was reversed on appeal. Whether the student's assault by another student was a result of grossly negligent supervision by the school district was held a matter for trial.[29]

A wrongful death action was successfully brought against a Florida board of education alleging negligent supervision during a school-sponsored photograph session. The accident took place on the school's roof where students had gathered for a yearbook picture. During the session a student fell through a skylight. The court held the extreme danger of having a school activity on the roof of a building required extraordinary precautions to protect the safety of students. General admonitions to be careful were clearly insufficient. The fact that a student may have warned the decedent not to step on the skylight did not fulfill a duty to warn.[30]

En Route to and from School. A personal injury action was brought on behalf of a Kansas kindergarten student who lost parts of both legs when he was run over by a train as he walked home.[31] The reversal of a decision that the child was not comparatively at fault was appealed. The court held that the school district did not, through its conduct or written policies, affirmatively assume a duty to protect the child on his way to or from school.

A seven-year-old Missouri student was injured when she was struck by a school bus as she walked along the edge of the road. Although the driver of the bus had discharged the student only a few minutes earlier, he claimed not to have seen her moving along the side of the roadway. In the student's action for damages, the court found sufficient evidence of negligence based on the driver's failure to keep a careful lookout.[32]

A California student and her parents sued her school district for injuries she received when she was hit by a car in a crosswalk. The appeals court reversed the lower court decision, finding a reasonable person could conclude that an open school yard gate is a dangerous condition, where it encourages students to cross at an adjacent dangerous intersection.[33]

When a school bus "lurched forward" a North Carolina student injured his knee. The student filed suit under state law and was successful in his suit for damages. The court reasoned that the driver was not exercising any duty involving supervision, custody, protection, or control at the time of the accident. As a result, the standard of review was that of simple negligence rather than gross negligence.[34]

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[28] Peck v. Siau, 827 P.2d 1108 (Wash. Ct. App. 1992).

[29] Woodell v. Marion Sch. Dist. One, 414 S.E.2d 794 (S.C. Ct. App. 1992).

[30] Dade County Sch. Bd. v. Gutierrez, 592 So. 2d 259 (Fla. Ct. App. 1992).

[31] Honeycutt v. City of Wichita, 836 P.2d 1128 (Kan. 1992). *See* Lehman v. County of Lebanon Transp. Auth., 599 A.2d 259 (Pa. Commw. Ct. 1991).

[32] Countryman v. Seymour R-II Sch. Dist., 823 S.W.2d 515 (Mo. Ct. App. 1992).

[33] Joyce v. Simi Valley Unified Sch. Dist., 11 Cal. Rptr.2d 137 (Dist. Ct. App. 1992).

School Buildings and Grounds. A New York teacher brought suit against the city for injuries sustained when her feet became entangled in a sash cord causing her to fall. In the decision for the teacher, the court held that the school had actual notice of the defective cord and shade. The teacher had repeatedly informed the school janitor of inoperable windows and poor lighting near the windows due to a failure to replace light bulbs. General awareness of problems related to the windows sufficed to put the school on notice of potential problems with the sash cord.[35]

Negligence Defenses

Even if an injured plaintiff can satisfy the *prima facia* case, the defendant school district, administrator, or teacher still has a number of defenses available to overcome the claim. The most commonly used defense has been governmental (sovereign) immunity. However, the use of this defense is increasingly being restricted by statute as well as judicial interpretation. Litigation in this area generally seeks to test limits and exceptions.

Immunity

Common Law (Governmental Immunity). Ten cases involved governmental immunity defenses. In only two instances were plaintiffs successful in their actions.

A first-grade Tennessee student was injured when struck by an automobile after exiting his school bus. In the action on his behalf against the school district, the court found a breach of duty owed to the student. Specifically, a school bus driver must ascertain which direction a child will travel after departing the bus. When the driver made a decision where to stop at a particular intersection, his action resulted in the student attempting to cross the road unsupervised at an unfamiliar location. The court found the driver's decision an operational act, not within the discretionary function exception to governmental immunity.[36]

While attempting to attend her daughter's graduation ceremony, a Pennsylvania woman suffered injuries when she fell while stepping off a curb. Her action against the school district alleged violation of a statutory requirement to provide proper handicapped access. The court failed to accept the district's immunity defense. Exception to governmental immunity was found in the district's failure to install "curb cuts," thereby creating a dangerous condition of sidewalks.[37]

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[34] Gardner v. Biggart, 417 S.E.2d 858 (S.C. 1992).

[35] Sweeney-Kamouh v. City of New York, 579 N.Y.S.2d 392 (App. Div. 1992).

[36] Bowers v. City of Chattanooga, 826 S.W.2d 427 (Tenn. 1992). *See* Brelish v. Clarks Green Borough, 604 A.2d 1235 (Pa. Commw. Ct. 1992).

An action was brought on behalf of a New Jersey student who was hit by an automobile as he attempted to ride home on his bicycle. Finding for the defendant school district, the court determined the decision not to establish traffic patrols to be a discretionary one immune from liability. Additionally, the county's liability for failure to place signs and devices to reduce speed limits could not be established without evidence of specific statutes and regulations requiring the county to do so.[38]

After deciding to walk home rather than take the school bus, a seven-year-old Minnesota student was struck and killed by a driver involved in a high speed chase with the police. The school district had adopted a policy which made the individual responsible for getting on the bus. In the negligence action brought against the school district, the adoption and implementation of the student transportation policy was held a protected planning level decision rather than an unprotected operational decision.[39]

A Pennsylvania school district successfully advanced a sovereign immunity defense in a case involving a teenager struck by an automobile as he attempted to cross a highway to get to school. No cause of action was advanced under statutes pertaining to exceptions to sovereign immunity.[40] In another Pennsylvania case, parents of a child injured while crossing a highway en route to school failed in their attempt to establish a real estate exception to governmental immunity. The district's site selection for a school bus stop was not equated with a physical defect in real estate, as the injury to the child was proximately caused by a third party's vehicle.[41]

An Ohio child was sexually abused by the cab driver contracted by the school district to transport her. The district successfully advanced a defense of sovereign immunity as the court found discretionary the decision to transport the developmentally handicapped child by taxi cab.[42]

A Pennsylvania school district was found immune from a suit brought by a teacher following her assault by a student.[43] The allega-

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37. Gilson v. Doe, 600 A.2d 267 (Pa. Commw. Ct. 1991).
38. Fielding v. Heiderich, 832 P.2d 1244 (Or. Ct. App. 1992). *See* Luna v. Harlingen Consol. Indep. Sch. Dist., 821 S.W.2d 442 (Tex. Ct. App. 1991).
39. Pletan v. Gaines, 481 N.E.2d 566 (Minn. Ct. App. 1992).
40. Majestic v. Commonwealth Dep't of Transp., 601 A.2d 386 (Pa. Commw. Ct. 1992). *See* Stein v. Commonwealth Dep't of Transp., 601 A.2d 384 (Pa. Commw. Ct. 1992).
41. Combs v. Borough of Ellsworth, 615 A.2d 462 (Pa. Commw. Ct. 1992).
42. Tinkham v. Groveport-Madison Local Sch. Dist., 602 N.E.2d 256 (Ohio Ct. App. 1992).
43. Purdy v. Romeo, 613 A.2d 91 (Pa. Commw. Ct. 1992).

tions that her supervisors interfered with her employment contract and conspired to harass and intimidate her into resigning did not fall within any category of waiver of governmental immunity.

After a teacher accompanied her pupils out of the school building at the end of the day, she returned to her classroom where she was robbed and sexually assaulted. Her action against the city and school board was based on an allegation of failure to repair the lock on her classroom door. The trial court decision that the provision of security was a proprietary function not subject to immunity was reversed on appeal.[44] The court determined that providing security was a governmental function from which the teacher was unable to prove the existence of a special duty owed to her by the defendants.

A Missouri school contained stairs which surrounded an open stairwell guarded only by a bannister of a height which made it accessible to children. While sliding down the bannister, a student fell sustaining injuries. The dismissal of the action for damages brought on behalf of the student was upheld on appeal. With no allegations that the stairs or banisters were defective, there was no waiver of sovereign immunity.[45]

Statutory Immunity. The application of an Illinois tort immunity act was the issue in a case of a student's negligence action for an injury sustained on a school bicycle trip. The school district claimed immunity despite the fact that the accident took place off school grounds on public property. The court held proper the interpretation of the immunity act granting immunity on all public property whether owned by the public entity or not.[46]

Water had collected at the entrance of a Nevada Elementary School resulting in a woman's slip and fall. In her action against the school district, she alleged a county parks employee acknowledged he had seen water on the floor shortly before the accident. Finding for the district, the court held the express knowledge exception to the immunity statute did not extend to a situation in which the school had only an implied knowledge of a hazardous condition. There was no evidence that the parks employee had informed a school district employee of the situation. Furthermore, with the school district and county being separate entities with different governing boards, knowledge by a county employee could not be imputed to the school district.[47]

In another Illinois case, a school district was not immune from liability for injuries a child sustained when he fell in a rut during recess. As

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44. Berler v. City of New York, 584 N.Y.S.2d 709 (Sup. Ct. 1992).
45. Stevenson v. City of St. Louis Sch. Dist., 820 S.W.2d 609 (Mo. Ct. App. 1991).
46. Castenada v. Community Sch. Dist. Unit No. 200, 589 N.E.2d 1038 (Ill. Ct. App. 1992). *See* Pritchard v. Arvon, 413 S.E.2d 100 (W. Va. 1991). Qualified tort immunity provisions of the state's Governmental Tort Claims Act were held constitutional. *See also*, Koch v. Billings Sch. Dist. No. 2, 833 P.2d 181 (Mont. 1992).
47. Nardozzi v. Clark County Sch. Dist., 823 P.2d 285 (Nev. 1992).

the negligence was alleged against a school district rather than a teacher or other certified educational employee, the immunity section of the School Code did not provide protection.[48]

A New York high school principal sought immunity from a suit brought by his assistant principal. The court determined that the principal's actions, including placing a dead pigeon in her school mailbox, vandalizing her car, and directing staff members to ostracize her, did not constitute conduct within the scope of his employment. Therefore, the principal was not entitled to immunity, and the assistant principal could pursue her claim.[49]

A Montana student was injured when she was struck by a shot put thrown by a teacher. Following the teacher's instructions, the student had been marking where previous shots had landed. In the child's action against the school district and teacher, both defendants were found immune from liability. That decision was reversed on appeal as the teacher's alleged negligent actions in supervising the playground did not arise from a lawful discharge of her official duties, as defined under an amended immunity statute.[50]

While playing in an after school hours basketball game, a California adult was injured when he ran into an unpadded wall. The court found that participation in a hazardous recreational activity was inherently risky. As such, the school district was statutorily immune from liability.[51]

Other Defenses

Comparative Negligence. A Louisiana motorist was injured when a school bus backed into his automobile. In his successful action against the school board, evidence was presented proving a causal relationship between the bus accident and his later injury while playing volleyball. However, the trial court's assessment of 50% comparative fault was increased to 70%.[52]

Notice of Claim. Several of the notice of claim cases were decided on largely technical grounds.[53] The remaining ten cases were evenly divided between those plaintiffs who were allowed to file late notice and those who were not.

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[48] Sidwell v. Griggsville Community Unit Sch. Dist. No. 4, 588 N.E.2d 1185 (Ill. 1992).

[49] Radvany v. Jones, 585 N.Y.S.2d 343 (App. Div. 1992).

[50] Hedges v. Swan Lake & Salmon Prairie Sch. Dist. No 73, 832 P.2d 775 (Mont. 1992).

[51] Yarber v. Oakland Unified Sch. Dist., 6 Cal. Rptr.2d 437 (Ct. App. 1992).

[52] Starnes v. Caddo Parish Sch. Bd., 598 So. 2d 472 (La. Ct. App. 1992).

[53] Southwestern Bell Telephone Co. v. Los Fresnos Consol. Indep. Sch. Dist., 829 S.W.2d 916 (Tex. Ct. App. 1992). Smith v. Sagistano, 587 N.Y.S.2d 764 (App. Div. 1992). Boulay v. City of Waterbury, 607 A.2d 450 (Conn. Ct. App. 1992). Berube v. City of Northampton, 602 N.E.2d 560 (Mass. 1992).

A seven-year-old student was injured when the school bus in which she was riding turned over. Her mother was successful in her attempt to file a late notice of claim. The court found that the school district had actual notice of the accident. There had been front page newspaper coverage of the event and the students involved in the accident underwent medical examinations. Late notice was granted by the court as the true nature of the student's injuries had not been immediately apparent.[54]

Similarly, a plaintiff was able to file a late notice of claim as the New York school district had knowledge of the injury to his eye and the severity of the injury could not be determined until swelling had subsided.[55]

The fracture of a New York student's wrist was determined to be a serious enough injury to have alerted the school district to undertake a thorough investigation of the incident. The court allowed a late notice of claim as the student's failure to file timely notice was predicated upon the district's representation that it would assume responsibility for the student's medical expenses.[56]

In another New York case, late notice was not allowed as the infancy of a student who was assaulted before school was not held a factor in the delay. The plaintiffs conceded that they deliberately delayed serving notice for fear of possible retaliation by the school district.[57]

Following his reassignment, a New York teacher brought a section 1983 action against his school district. The action was dismissed as the teacher's pursuit of administrative remedies did not serve to stall the statute of limitations on the federal claim.[58]

A Pennsylvania school district brought an action against a general contractor after structural problems surfaced in a school building. The action was dismissed as untimely and the school district's appeal was successful.[59] The court found that seeking to recover damages for negligence or defects in buildings housing school children is seeking to vindicate public rights and protect public property. When such is the case, a school district can evoke the doctrine of *nullum tempus occurrit regi* (time does not run against the king) to defeat the applicable statute of limitations.

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[54] Lamica v. Malone Cent. Sch. Dist., 580 N.Y.S.2d 93 (App. Div. 1992).

[55] Espositio v. Carmel Cent. Sch. Dist., 589 N.Y.S.2d 703 (App. Div. 1992).

[56] Zimmet v. Huntington Union Free Sch. Dist., 589 N.Y.S.2d 546 (App. Div. 1992).

[57] Doukas v. East Meadow Union Free Sch. Dist., 590 N.Y.S.2d 226 (App. Div. 1992). *See* Kerch v. Silvestri, 587 N.Y.S.2d 804 (App. Div. 1992). An accident victim failed to serve timely notice for an accident that occurred while a New York school superintendent was driving a district vehicle in the scope of his employment.

[58] Szarejko v. Great Neck Sch. Dist., 795 F. Supp. 81 (E.D.N.Y. 1992). *See* Ireland v. Hinkle, 577 N.Y.S.2d 541 (App. Div. 1991). Late notice of claim was allowed in bus accident.

[59] Stroudsburg Area Sch. Dist. v. R.K.R. Assoc./Architects, 611 A.2d 1276 (Pa. Super. Ct. 1992). *See* Mt. Lebanon Sch. Dist. v. W.R. Grace and Co., 607 A.2d 756 (Pa. Super. Ct. 1992). Again the doctrine of *nullum tempus* was found applicable.

A contracting company brought thirty causes of action against the New York City seeking damages arising from construction work performed at various public school locations. The company was successful in its appeal of the dismissal of the complaints. The court held that late notices of claim should have been granted as there is difficulty determining the date of substantial completion of a construction project.[60]

The employee of a contractor brought suit against an Illinois board of education for injuries sustained when a group of lockers fell on him. The board's third-party action against the contractor was barred for failure to meet a two-year statute of limitations.[61]

A Texas ten-year statute of limitations on actions against architects, engineers, and contractors was not found to apply to manufacturers of asbestos products used in school buildings. The statute was determined to distinguish between construction professionals and manufacturers of materials and products which become improvements to real property.[62]

Liability Insurance

Twenty-four school districts, the state of Wisconsin, and several state agencies and officers were named as defendants in federal racial discrimination litigation. With the settlement of the case, an action was brought against respective insurance carriers. The court found injunctive, declaratory, and remedial relief to constitute "damages" under the policies. Therefore, the carriers were obligated to defend the school districts for the litigation and to reimburse them for expenditures incurred in funding programs to remedy the alleged discrimination as required by the settlement.[63]

The parent of a California student purchased an accident policy for her son based on information in a brochure provided by the school district. There was a statement in the brochure that it was not an insurance policy and that the master policy was on file at the school. After an injury to the student caused him the loss of vision in one eye, the parent made a claim with the insurer. Believing she was misled by information in the brochure, suit was brought against the insurer. Finding a conflict between the provisions in the brochure and those in the policy, the court held the insurer to the broader coverage provided in the brochure.[64]

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[60] Prote Contracting Co. Inc. v. Board of Educ. of City of N.Y., 583 N.Y.S.2d 261 (App. Div. 1992).

[61] Carlson v. Moline Bd. of Educ., 596 N.E.2d 176 (Ill. Ct. App. 1992).

[62] Dayton Indep. Sch. Dist. v. United States Mineral Prod. Co., 800 F. Supp. 1430 (E.D. Tex. 1992). *See* Hebron Pub. Sch. Dist. No. 13 v. United States Gypsum, 953 F.2d 398 (8th Cir. 1992). The district's cause of action accrued for limitations purposes when the presence of asbestos was discovered.

[63] School Dist. of Shorewood v. Wausau Ins. Co., 484 N.W.2d 314 (Wis. 1992).

Wisconsin school districts settled a race discrimination action and sought to recover the monies expended in complying with the settlement agreement, as well as the attorney fees incurred in defending themselves.[65] The court found the insurance policies covered complaints alleging districts were "affected by" the discriminatory acts of other governmental agencies. However, as the declaratory and injunctive relief sought did not constitute "damages" under the policies, the carriers were not found to have a duty to defend and indemnify the school districts.

Following the conviction of an Alabama teacher for sexually molesting three of his students, the school district's insurer sought a declaration that it owed no duty to defend or indemnify him. Finding for the insurer, the court held the teacher's acts fell within the policy's exclusions for educational employment activities, criminal activity, and intended injury.[66]

A California school district sought to have its excess insurer pay for the property damage suffered by its schools as a result of vandalism and arson. The insurers were able to show the claims involved three separate incidents. Although the acts of vandalism and arson took place during the same evening, they were committed by several people out of public view. Therefore, the court held that they could not be considered a result of a "riot" and instead triggered separate $100,000 loss occurrences, relieving the excess insurers of responsibility.[67]

Attorney Fees

A Massachusetts school committee sought injunctive relief when a city mayor refused to approve a contract engaging an attorney to serve as legal counsel. The court granted the application, holding that the city could not refuse payment under the state's statute giving the committee the right to hire counsel for general purposes.[68]

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[64] Palsce v. Guarantee Trust Life Ins. Co., 588 N.E.2d 525 (Ind. Ct. App. 1992).

[65] School Dist. of Shorewood v. Wausau Ins. Co., 488 N.W.2d 82 (Wis. 1992).

[66] Horace Mann Ins. Co. v. Fore, 785 F. Supp. 947 (M.D. Ala. 1992). *See* Horace Mann Ins. Co. v. Barbara B., 4 Cal. Rptr.2d 351 (Ct. App. 1992).

[67] North Bay Schs. Ins. Auth. v. Industrial Indem. Co., 10 Cal. Rptr.2d 88 (Ct. App. 1992).

[68] School Comm. of Chicopee v. City of Chicopee, 590 N.E.2d 1158 (Mass. 1992). *See* Crump v. Board of Educ. of Hickory Admin. Sch. Unit, 420 S.E.2d 462 (N.C. Ct. App. 1992). There was no indication that the trial court did not indicate whether special circumstances existed to render an award of attorney fees unjust. Henrico County Sch. Bd. v. Bohle, 421 S.E.2d 8 (Va. Ct. App. 1992). Workers' Compensation Commission method of payment resulted in double credit for attorney fees.

A former Wisconsin principal, who had been active in an administrators' association, alleged that his resignation was coerced and a violation of his constitutional rights. The suit failed and attorney fees were awarded to the defendants. His attempt to have that decision reversed was unsuccessful, as the court found the action frivolous.[69] Rather than retaliation for involvement in the administrator's association, the school board's recommendation for termination had been based on the administrator's violation of a district residency requirement.

A teacher's aide brought an action against a Washington school district for attorney fees for arbitration arising out of charges that he had fondled a student. The court found that an arbitration proceeding is an "action" and an arbitration award is a "judgment," under a statute requiring reasonable fees in an action where a person is successful in recovering a judgment for wages. However, the court found that the statutory right was waived by a provision of a collective bargaining agreement requiring fees and expenses of the arbitrator to be shared equally by the school district and the union, with all other expenses borne by the party incurring them.[70]

A New York teacher sought attorney fees following an unsuccessful attempt to have a law governing medical examinations of teachers held unconstitutional. Ruling against the award of fees, the court found the teacher's action frivolous, as was an attempt to press ahead with an action against the superintendent.[71]

An Arizona student sought attorney fees following her successful action for inclusion in a high school honor society induction ceremony. Noting that the school district canceled the ceremony rather than include the pregnant, unmarried student, the court found that the district had acted in bad faith and upheld an award of fees.[72]

The mother of a New York student was unsuccessful in the civil rights action she brought on behalf of her son. His denial of entrance into the school's Honor Society was upheld and court fees were awarded to the defendants. That award was upheld on appeal as the action was found frivolous, unreasonable, and without foundation.[73]

Two cases involved successful attempts to secure attorney fees in civil rights cases. Attorney fees for representing an Arkansas school district in a desegregation case were upheld.[74] Also, Ohio teachers were found entitled to reasonable attorney fees in actions brought under specific civil rights statutes.[75]

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[69] Munson v. Milwaukee Bd. of Sch. Directors, 969 F.2d 266 (7th Cir. 1992).

[70] Hitter v. Bellevue Sch. Dist. No. 405, 832 P.2d 130 (Wash. Ct. App. 1992).

[71] Strong v. Board of Educ. of Uniondale Union Free Sch. Dist., 789 F. Supp. 99 (E.D.N.Y. 1991).

[72] Cazares v. Barber, 959 F.2d 753 (9th Cir. 1992).

[73] Dangler v. Yorktown Cent. Schs., 777 F. Supp. 1175 (S.D.N.Y. 1991).

[74] Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist., 959 F.2d 716 (8th Cir. 1992).

Employee Injuries/Workers' Compensation

A New York court held the injury sustained by an untenured teacher participating in a donkey basketball game was compensable. The teacher had been encouraged by her principal to participate, and the injury was determined to have been in an activity promoted by her employer.[76]

The fact that job stress may only have been a contributing cause of precipitation of a New York instructor's preexisting mental condition did not mean that a compensable injury was not sustained. The term accident was determined to include mental injury caused by emotional distress over an extended period of time.[77]

A custodian fell off the stage in a New York high school auditorium. The school district appealed his award of lost wages after his retirement. The court upheld the award as the employer was unable to show that the custodian's loss of employment was solely due to economic or other causes unrelated to his injuries.[78] A Montana school bus driver appealed the decision of the Workers' Compensation Court. In denying the appeal, the court determined that he had reached maximum healing after a 1986 neck injury but prior to a 1987 injury. Thus, 1987 law was appropriate in calculating benefits. Also, evidence supported that the driver was permanently partially, rather than permanently totally disabled.[79] His rehabilitation specialist, therapists, doctors, and a Rehabilitation Panel all determined that he could engage in light work based upon his age, education, experience, aptitude, physical capabilities, and limitations.

A vocational sewing teacher sought to establish her total disability after she severed a finger on her left hand in a cloth-cutting machine. The court reversed the compensation board's ruling in favor of the teacher. The claim of total disability was denied as the increasing loss of use of the teacher's left hand was not a separate and distinct disability from that which would normally follow her injury.[80]

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75. Gibney v. Toledo Bd. of Educ., 596 N.E.2d 591 (Ohio Ct. App. 1992).

76. Midey v. Romulus Cent. Sch. Dist., 584 N.Y.S.2d 948 (App. Div. 1992). *See* Moses v. Board of Educ. of the New Castle County Vocational Technical Sch. Dist., 602 A.2d 61 (Del. Super. Ct. 1991). Benefits were not limited to only one three-month period for any given injury.

77. Cerami v. City of Rochester Sch. Dist., 590 N.Y.S.2d 306 (App. Div. 1992).

78. Phillips v. Elmira City Sch. Dist., 577 N.Y.S.2d 525 (App. Div. 1991).

79. Kelly v. State Compensation Mut. Ins. Fund. Belt Pub. Schs., 835 P.2d 774 (Mont. 1992).

80. School Dist. of Philadelphia v. Workmans' Compensation Appeal Bd., 603 A.2d 266 (Pa. Commw. Ct. 1992).

Following a work-related injury, a Florida custodian was awarded workers' compensation benefits based on his average *weekly* wage (AWW). When he returned to work, he was reinjured. His employer/carrier unsuccessfully challenged a subsequent compensation award. The court held that it would be unfair to penalize the custodian, who attempted to return to work at a lower wage, by computing an AWW based on the lower wage figure.[81] A pre-existing back condition prevented an injured bus driver from receiving an award of benefits. She suffered the injury when she picked up a piece of paper from the floor of her bus. While cleaning the bus was considered a part of her employment duties, the Florida court held that the injury was a result of normal movement and the preexisting condition, and was not aggravated by her employment.[82]

A Kentucky teacher with a serious allergy problem filed for workers' compensation benefits, alleging an occupational disability due to irritants in the work place.[83] In denying the claim, the court cited evidence that the teacher's symptoms were triggered by a wide variety of common substances. Where a worker's sensitivities are so wide-ranging it is not enough that the worker is symptomatic at work, for this does not prove the worker suffered an increased risk due to the employment.

A New Mexico school aide sought compensation for psychological injury she allegedly sustained when a co-employee made a bomb threat demanding she be fired. In denying the claim, the court found the threat was rooted in personal animosity involving matters unrelated to employment.[84]

A former high school and college baseball player volunteered to act as an assistant pitching coach for a Colorado high school. While standing in the team's dugout during a game, he was struck in the face by a line drive. His action for employee benefits was denied, as the head baseball coach was not found to have the authority to appoint persons to the "office" of volunteer assistant coach. Therefore, he did not qualify as an employee entitled to benefits.[85]

Defamation/Invasion of Privacy

A Connecticut teacher resigned in the face of allegations of improper conduct in the classroom. Following the resignation, he alleged students, parents, and members of the board of education maliciously published defamatory material intentionally causing him emotional distress. The court held that privileged statements were made and published in the furtherance of a quasi-judicial proceeding investigating the allegations. As such, damages could not be recovered, even if the statements were published falsely and maliciously.[86]

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[81] Pinellas County Sch. Bd. v. Higgins, 597 So. 2d 355 (Fla. Ct. App. 1992).

[82] Hillsborough County Sch. Bd. v. Williams, 601 So. 2d 624 (Fla. Ct. App. 1992).

[83] Champion v. Beale, 833 S.W.2d 799 (Ky. 1992).

[84] Bader-Rondeau v. Truth or Consequences Mun. Schs., 824 P.2d 358 (N.M. Ct. App. 1992).

[85] Mesa County Valley Sch. Dist. No. 51 v. Goletz, 821 P.2d 785 (Colo. 1991).

A Texas substitute teacher alleged that he was defamed by a principal's memorandum concerning his fitness as a teacher. In denying his claim, the court found that the principal's actions were within the scope of his employment and an exercise of judgment and discretion.[87]

A Vermont principal alleged that he was defamed when he was added to a list of defendants charged with mismanagement of funds. Specifically, he objected to the public reading of charges at a school board meeting. Finding for the school district, the court held the principal to be a "public official," and found no evidence that the district doubted the truth of its charges or acted out of malice.[88]

A teacher brought an action against a New Jersey school and school officials alleging a photograph in the school's yearbook was defamatory. The court disagreed finding no defamation where material is clearly understood as being parody, satire, humor, or fantasy. Furthermore, school officials were not negligent in failing to supervise the publication of humorous pictures in a school yearbook.[89]

Products Liability

An Illinois chemistry teacher arrived at school early to produce chlorine gas for a yearly experiment for an advanced class. The large exhaust fan with which he expected to draw out any escaped gas failed to operate, as it was tied into a computerized energy management system which did not provide electricity until a few minutes later. As a result of breathing gas fumes, the teacher became permanently disabled. He was unsuccessful in his action against the manufacturer of the computerized system and the dealer which sold it.[90] The court found that the system was not defective or inherently dangerous. Additionally, the manufacturer had no duty to warn of a merely conceivable danger that someone would be injured during a chemistry experiment performed in the school during nonoccupancy hours.

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[86] Kelley v. Bonney, 606 A.2d 693 (Conn. 1992). *See* Hayes v. Smith, 832 P.2d 1022 (Colo. Ct. App. 1992). Allegations of homosexual conduct was not slander *per se*.

[87] Jones v. Houston Indep. Sch. Dist., 979 F.2d 1004 (5th Cir. 1992).

[88] Palmer v. Bennington Sch. Dist. Inc., 615 A.2d 498 (Vt. 1992). *See* Ellerbee v. Mills, 422 S.E.2d 539 (Ga. 1992). High school principal was not a "public official" required to establish malice to prevail in a defamation action.

[89] Salek v. Passaic Collegiate Sch., 605 A.2d 276 (N.J. Super Ct. 1992).

[90] Sparacino v. Andover Controls Corp., 592 N.E.2d 431 (Ill. Ct. App. 1992).

In a different approach to an asbestos-in-building case, a Colorado school district sought recovery for alleged property damage caused by vinyl asbestos floor tile (VAT). A jury verdict for the school district was reversed on appeal.[91] The court rejected the three distinct injuries allegedly caused by the VAT manufacturer. First, the court held that tort liability could not be premised on the "mere risk of harm." Second, while the presence of VAT may have imposed increased renovation costs, such costs did not represent the type of injury that could support a negligence claim. And, finally, the court looked at the claim of injury caused by past releases of asbestos fibers from VAT, and concluded that such contamination constituted physical injury compensable in tort, but in the present case, the district had failed to produce sufficient evidence of contamination to justify sending this final claim to the jury. As a result, the lower court decision was reversed and the case was remanded with instructions to provide a directed verdict in favor of the defendant.

A New Jersey board of education lost its suit to recover the cost of removing asbestos containing materials from its schools. The court found that the contractor had completed the construction work in accordance with plans and specifications provided by the school district. There was no duty for the contractor to inspect products specified for use to detect for unknown dangers.[92]

A North Carolina county board of education successfully brought an action against a manufacturer to recover costs associated with the removal of asbestos-containing ceiling tiles.[93] The court found evidence that the board relied on misrepresentation and omissions to support a claim of fraud.

A manufacturer of asbestos products was denied a summary judgment in an action brought by a Kansas school district seeking damages for the removal and replacement of asbestos-containing building materials. The court found that the district's claim of restitution, and questions of fact concerning the fraudulent misrepresentation claim, precluded such a judgment.[94]

A junior high school shop teacher brought a products liability suit against the saw's manufacturer and distributor. Finding in favor of the defendants, the court held that contributory negligence is a defense to strict products liability actions under Nebraska law.[95]

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91. Adams-Arapahoe Sch. Dist. No. 28-J v. GAF Corp., 959 F.2d 868 (10th Cir. 1992).
92. Board of Educ. of the City of Clifton v. W.R. Grace Corp., 609 A.2d 92 (N.J. Super. Ct. App. 1992).
93. Rowan County Bd. of Educ. v. United States Gypsum Co., 418 S.E.2d 648 (N.C. 1992).
94. Unified Sch. Dist. No. 500 v. United States Gypsum Co., 788 F. Supp. 1173 (D. Kan. 1992).
95. Tillwick v. Sears, Roebuck & Co., 963 F.2d 1097 (8th Cir. 1992).

Construction Contracts

Two subcontractors working on improvement projects for an Illinois school district sued the district to collect amounts unpaid by the general contractor. Finding for the subcontractors, the court held that the state's bond act mandated the district to require the general contractor to provide a payment bond covering subcontractors.[96]

Constitutional Torts

A personal injury action unsuccessfully challenged the constitutionality of a Mississippi statute which set a limit of $10,000 damages in suits arising from bus accidents.[97] The court found that the blanket statutory damage limit bore a rational relationship to the protection of state funds.

Student Initiated Cases

A Texas high school student brought a civil rights suit alleging violation of her due process and equal protection rights under the Fourteenth Amendment as a result of being sexually molested by her teacher.[98] The court found it incontrovertible that such molestation rises to the level of constitutional deprivation of due process. The court further determined that the school principal and superintendent were liable for the malfeasance of the teacher. With the deliberate indifference to the notice they were given of the unconstitutional acts, the officials breached their constitutional duty to protect the student.

A high school student brought a section 1983 civil rights suit against an Ohio school district alleging its failure to protect her from repeated harassment and assaults by classmates.[99] The district court found the plaintiff unable to raise a claim of constitutional magnitude. By seeing parents or guardians as the primary caretakers of students, the court rejected the claim that the district had a special relationship with the student giving rise to a section 1983 suit. Furthermore, as the classmates who committed the violative acts were in no way connected with the state of Ohio, there was no liability upon the district for its policies, customs, or practices.

Two female students alleged they were sexually molested by classmates in a unisex bathroom and darkroom during art class. Their claim for damages under sections 1983 and 1985 was unsuccessful.[100] Although it was alleged that school officials were aware of the acts, the court held that no special relationship existed between the students and the school which would give rise to a section 1983 claim. Additionally, even if the school defendants were in violation of state law requiring them to report such abuse to parents, this would not have been a violation of federal statutory or constitutional rights under state law. The most that can be said is that they stood by and did nothing when serious circumstances dictated a more active role.

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[96] East Peoria Community High Sch. Dist. No. 309 v. Grand Stage Lighting Co., 601 N.E.2d 972 (Ill. Ct. App. 1992).

[97] Turrentine v. Brookhaven, Miss. Sch. Dist., 794 F. Supp. 620 (S.D. Miss. 1992).

[98] Doe v. Taylor Indep. Sch. Dist., 975 F.2d 137 (5th Cir. 1992).

[99] Elliott v. New Miami Bd. of Educ., 799 F. Supp. 818 (S.D. Ohio 1992).

A section 1983 action was brought following the severe beating of a Georgia student by a classmate.[101] The student and his parents failed in the suit, as compulsory school attendance was not found to have imposed an affirmative constitutional duty upon the school board, superintendent, or principal to protect the student. The fact that fights between students occurred on a regular basis was deemed insufficient to establish that school officials should have known that the student was in danger from assault.

Employee Initiated Cases

A California principal, reassigned as a teacher, brought a civil rights action against the school district. Finding against the teacher, the court held that as a matter of law the school district was a state agency immune from suit under the Eleventh Amendment to the United States Constitution.[102]

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[100] D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364 (3d Cir. 1992). *See* Dorothy J. v. Little Rock Sch. Dist., 794 F. Supp. 1405 (E.D. Ark. 1992).

[101] Russell v. Fannin County Sch. Dist., 784 F. Supp 1576 (N.D. Ga. 1992).

[102] Belanger v. Madera Unified Sch. Dist., 963 F.2d 248 (9th Cir. 1992).

6

SPORTS

LINDA A. SHARP

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Introduction

This Chapter includes all cases, at either the K-12 or higher education levels, which deal with student-athletes, coaches, athletic directors, athletic facilities, athletic associations, and booster organizations. However, no case law is discussed which pertains to physical education instruction.

Eligibility

This section contains thirteen cases: two cases dealt with academic issues; two students were ineligible due to limitations on years of eligibility; two players were ineligible due to misconduct; one case involved a challenge to an age rule; two cases addressed transfer rules; one case dealt with the nonrenewal of an athletic scholarship; two cases discussed drug testing for athletes; and one case related to a state statute which mandated due process standards for the NCAA.

Academic Issues

A collegiate wrestler transferred to a private college after attending a public university in the Midwest for two semesters. Unfortunately, he failed a course at the Midwestern school which made him ineligible for participation at the school to which he transferred for one year, because he did not meet the academic good standing requirements of an NCAA transfer rule. The plaintiff's attempt to secure a preliminary injunction against the NCAA so that he could remain eligible for competition failed because the defendant athletic association was not a state actor and the plaintiff alleged a violation of his constitutional due process rights.[1]

A high school basketball player who was dismissed from the team alleged that her dismissal violated her due process rights. She argued that her inability to participate would jeopardize her chances of obtaining a college athletic scholarship, which she otherwise would have been virtually assured of receiving. The federal district court denied injunctive relief on the basis that her interest in participating in athletics was a mere expectation not a constitutionally protected claim of entitlement.[2]

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[1] Collier v. National Collegiate Athletic Ass'n, 783 F. Supp. 1576 (D.R.I. 1992).

Limitation on Years of Eligibility

A high school athlete who was stricken with a chronic illness sought additional eligibility pursuant to the rules of the high school athletic association. When his request for eligibility was denied he sought a declaratory judgment that the rules of the association violated equal protection and due process. The lower court granted declaratory and injunctive relief. The Indiana appellate court found that the athletic association was a state actor based on footnote thirteen of the *Tarkanian*[3] decision which cited early cases that held state high school associations to be state actors. Furthermore, the court held that the rule in question was over broad and to apply the rule in this case was arbitrary and capricious. The injunctive relief was, therefore, affirmed except insofar as it lacked an end point for eligibility.[4]

A college basketball player who attended the University of Kentucky, an NCAA school, had his eligibility revoked because of academic fraud in taking an ACT test. Thereafter he attended a junior college from which he received an associate degree. The player was then recruited to play basketball at defendant university, an NAIA institution. However, he was declared ineligible because the NAIA deemed that his ineligibility at an NCAA school led to automatic ineligibility under the NAIA rules. This declaration was contrary to the plain language of the NAIA rule which spoke of "completion" of eligibility at an NCAA school. The Oklahoma appellate court held that the NAIA had inappropriately created a special rule for the plaintiff, since there were numerous other NAIA athletes who had previously been ineligible under NCAA rules but who were participating in NAIA competition. The appellate court affirmed the injunction which prevented the defendant university and the NAIA from interfering with plaintiff's scholarship until he completed ten semesters or graduated.[5]

Discipline

A varsity basketball player brought a section 1983 action against university officials because he received a one semester suspension from the university. The suspension transpired after the player engaged in a sophisticated "scam" to steal from the campus bookstore with fraudulent refund slips. Prior to the campus disciplinary proceeding the player plead guilty to a criminal charge. The Eighth Circuit Court of Appeals held that there was no evidence of a constitutional violation in the treatment he received by the university in this matter.[6]

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[2] McFarlin v. Newport Special Sch. Dist., 784 F. Supp. 589 (E.D. Ark. 1992).

[3] *See* THE YEARBOOK OF EDUCATION LAW 1989 at 167, 488 U.S. 179 (1988).

[4] Indiana High Sch. Athletic Ass'n, Inc. v. Schafer, 598 N.E.2d 540 (Ind. Ct. App. 1992).

[5] Manuel v. Oklahoma City Univ., 833 P.2d 288 (Okla. Ct. App. 1992).

In New York, a high school wrestler admitted to his guilt in stealing muffins from the school cafeteria. Thereafter he received a two-day academic suspension from the principal and a suspension for the rest of the wrestling season from the athletic director. According to the New York Supreme Court, the imposition of the suspension from athletics was arbitrary and capricious. The Board of Education had never adopted the Interscholastic Athletic Guide which the athletic director cited as authority for his actions. Furthermore, the Guide, even if adopted, failed to set forth minimal due process standards and was ambiguous regarding what was actually a transgression.[7]

Age

The Indiana Court of Appeals dealt with whether the rule of the state high school athletic association, which prohibited participation by those over the age of nineteen, could withstand equal protection scrutiny. A star high school football player who was prevented from playing his senior year challenged the rule. The court upheld the rule using the rational basis test; the IHSAA had legitimate interests in health and safety in promulgating such a rule.[8]

Transfer

A baseball player transferred from a university with a quarter term system to another university which was on the semester system. The conference commissioner declared the player ineligible on the basis that the player completed insufficient academic credits before transferring. In making this ruling, however, the commissioner made no allowance for the difference in academic calendars. The player obtained a TRO from a lower court on the basis that the ruling by the commissioner was arbitrary and capricious. The Arkansas Supreme Court held that the matter was moot since the player competed on the team during the spring semester.[9]

In Indiana, a high school golfer transferred schools after his freshman year to live with his father. During the freshman year he had lived with his mother, but she felt that he should live with his father because

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6. Coleman v. Monroe, 977 F.2d 442 (8th Cir. 1992).
7. Manico v. South Colonie Cent. Sch. Dist., 584 N.Y.S.2d 519 (Sup. Ct. 1992).
8. Thomas v. Greencastle Community Sch. Corp., 603 N.E.2d 190 (Ind. Ct. App. 1992).
9. Arkansas Intercollegiate Conference v. Parnham, 828 S.W.2d 828 (Ark. 1992).

he had some disciplinary problems. The high school athletic association declared him ineligible to compete during his sophomore year based on the transfer, although the principals of both schools asked the IHSAA to declare him eligible for competition since the transfer was not made for athletic reasons. The Seventh Circuit Court of Appeals held for the student on the basis that the IHSAA acted in an arbitrary and capricious manner and not in accordance with its own rules. The court reviewed the record and found that the assistant commissioner who had made the ruling changed his mind on three occasions to support his finding of ineligibility. He essentially made an ad hoc ruling which was arbitrary.[10]

Scholarship Nonrenewal

Two football players sued the university for breach of contract when their athletic scholarships were not renewed for their last year of eligibility. The appellate court in Washington held that there was no breach of contract because the scholarship document clearly stated that each award was for one year. However, if an award was not renewed the player(s) involved must be given due process, because the scholarship was issued under a representation that it would be renewed subject to certain conditions. This was sufficient to provide a legal claim of entitlement which warranted due process.[11]

The Supreme Court of Washington reversed the above holding finding that neither the financial aid contract nor any mutually explicit understanding provided by the university or by the NCAA gave a protected property interest in the renewal of the financial aid award.[12]

Drug Testing

Parents of an interscholastic athlete filed an action for declaratory and injunctive relief claiming that the school district's random drug testing policy for all students in interscholastic athletics violated the Fourth Amendment. After reviewing the school district's justifications for the urinalysis program currently in use, the federal district court held that the defendant's drug testing program was a "reasonable search" under the Fourth Amendment. There was evidence to show that athletes who were under the influence of drugs had performed in an unsafe manner. Additionally, the program was narrowly tailored and steps were taken to limit the intrusiveness of the testing procedures.[13]

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10. Crane v. Indiana High Sch. Athletic Ass'n, 975 F.2d 1315 (7th Cir. 1992).
11. *See* THE YEARBOOK OF EDUCATION LAW 1992 at 144, Conard v. University of Wash., 814 P.2d 1242 (Wash. Ct. App. 1991).
12. Conard v. University of Wash., 834 P.2d 17 (Wash. 1992).
13. Acton v. Vernonia Sch. Dist. 47J, 796 F. Supp. 1354 (D. Or. 1992).

In contrast to the above holding, a Colorado appellate court held that a university's mandatory drug testing program for student-athletes, which was based on "reasonable suspicion," was an "unreasonable search" under the Fourth Amendment. The interest in having drug-free athletes did not rise to the level of a compelling state interest which justified the intrusion into privacy at issue here. Furthermore, the student-athletes did not voluntarily sign the consent forms. The court suggested, however, that the "reasonable suspicion" standard may be upheld as reasonable if a school were able to provide actual data of drug abuse among student-athletes or to show drug-related injuries among athletes.[14]

Statutory Due Process

In the wake of considerable scrutiny of the enforcement procedures of the NCAA, a number of states, including Nevada, passed statutes requiring the NCAA to meet certain rigorous standards when it investigated universities within the borders of the state. In this case, the NCAA sought injunctive and declaratory relief from the Nevada due process statute which had been enacted into law in April 1991. The NCAA argued that the statute violated the commerce clause of the United States Constitution and impaired contractual rights between the NCAA and its members in violation of the contract clause of the Constitution.

The federal district court held that the statute imposed an excessive burden on interstate commerce because it prevented the uniform enforcement of NCAA regulations across the nation which effectively invalidated the NCAA's system of internal governance and enforcement. The statute also substantially impaired contractual relationships between the NCAA and its member institutions. This impairment was not necessary to achieve an important public purpose and was, therefore, a violation of the contract clause. The statute was held invalid and unenforceable against the NCAA.[15]

Equality of Programs

General

Former members of a club ice hockey team for women sued under title IX when the university refused to grant the team varsity status. The federal district court held that this refusal violated title IX since the university's reasons why the team should not have varsity status were pretextual. The real reason for not granting varsity status was the expense of doing so, which is not a sufficient reason to justify gender discrimination.[16]

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[14] Derdeyn v. University of Colo., 832 P.2d 1031 (Colo. Ct. App. 1991).

[15] National Collegiate Athletic Ass'n v. Miller, 795 F. Supp. 1476 (D. Nev. 1992).

A high school student brought a title IX action seeking damages for intentional gender-based discrimination in connection with a sexual relationship with her coach. The Office of Civil Rights had found a title IX violation, but closed the investigation after the school district agreed to affirmative action. The Eleventh Circuit Court of Appeals affirmed the district court's dismissal of the complaint on the basis that damages were not recoverable under a title IX action.[17] The Supreme Court reversed, as it held that a damages remedy was available.[18]

Boy to Play on Girls' Team

A high school boy who wanted to participate on the girls' field hockey team brought suit against the Rhode Island Interscholastic League (RIIL) because its rules limited field hockey to girls. The federal district court denied the student's motion for a preliminary injunction, ruling that there was no title IX violation, because athletic opportunities were not previously limited for his sex. The plaintiff's equal protection claim failed because redressing disparate athletic opportunities for females is an important governmental interest which would justify the imposition of such a rule.[19]

On the state claim that the above rule violated the equal protection guarantees found in the Rhode Island Constitution, the Rhode Island Supreme Court held that the state Superior Court erred in using the strict scrutiny standard for a gender-related equal protection claim. The appropriate standard is the intermediate standard, which is also the standard for federal constitutional claims. The injunctive relief granted by the lower court was vacated and the matter was remanded for consideration based on the legal standard enunciated by the Supreme Court.[20]

In another field hockey case from Pennsylvania, a school district's rule that prohibited males from participating on the girls' field hockey team, which was designated as a "girls only" team, was challenged. According to the federal district court, boys cannot be excluded from participation in this sport unless, using a title IX analysis, (1) field hockey was found to be a contact sport, and (2) boys' athletic opportunities had not been previously limited. The court reasoned that the exclusion violated title IX since field hockey is not a contact sport and since boys had limited opportunities for the last eighteen years at this school—females were not forbidden from trying out for any team, whereas males could not participate in the ten sports designated exclusively for female participation.[21]

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[16] Cook v. Colgate Univ., 802 F. Supp. 737 (N.D.N.Y. 1992).

[17] *See* THE YEARBOOK OF EDUCATION LAW 1991 at 157, Franklin v. Gwinnett County Pub. Sch., 911 F.2d 617 (11th Cir. 1990).

[18] Franklin v. Gwinnett County Pub. Sch., 112 S. Ct. 1028 (1992).

[19] *See* THE YEARBOOK OF EDUCATION LAW 1992 at 146, Kleczek v. Rhode Island Interscholastic League, 768 F. Supp. 951 (D.R.I. 1991).

[20] Kleczek v. Rhode Island Interscholastic League, Inc., 612 A.2d 734 (R.I. 1992).

Handicapped

In a New York case, a student had participated in football and basketball before he was involved in a serious motor vehicle accident which resulted in the removal of one kidney. The physician for the school district then recommended that this student not be allowed to participate in contact sports. The parents sought an order allowing the student to participate in football and basketball.

In 1986 the New York Legislature passed a provision allowing a student with a physical impairment to procure two independent medical opinions attesting to the person's capacity to participate in a "reasonably safe" manner. The court would then determine the student's ability to participate. In this case the student obtained the necessary opinions and his parents fully understood the risks of participation. Therefore, the court granted the plaintiffs' petition enjoining the school district from prohibiting the student's participation.[22]

Enforcement of Rules

In a New York case a nonpublic secondary school petitioned for membership in a high school athletic association. Membership was denied and the school challenged the procedure for application. The Supreme Court held that the referendum vote required as a prerequisite for admission of a nonpublic school violated equal protection and was arbitrary and capricious since it allowed denial for any reason or no reason at all.[23]

Tort

In 1992, there were thirty-two tort cases dealing with sport. Of these cases, three were intentional torts. Of the negligence cases, twenty-two dealt with participants and five cases concerned spectators. There were two educational malpractice cases.

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[21] Williams v. School Dist. of Bethlehem, Pa., 799 F. Supp. 513 (E.D. Pa. 1992).

[22] Pace v. Dryden Cent. Sch. Dist., 574 N.Y.S.2d 142 (Sup. Ct. 1991).

[23] Friends Academy v. Section VIII of N.Y. State Pub. High Sch. Athletic Ass'n, 588 N.Y.S.2d 525 (Sup. Ct. 1992).

Intentional

Section 1983. A high school wrestler suffered severe knee damage after his coach sent him back into a bout after the student hurt his knee. The student's mother alleged that she told the coach not to allow further participation, given the apparent injury to her son. The federal district court dismissed the action because, even if the coach acted intentionally in putting the student back in to wrestle, there was no constitutional violation. There was no violation of the student's substantive due process rights because the coach did not violate the student's bodily integrity by direct contact with the student.[24]

Defamation. A university athletic director who had been fired brought a defamation action against the university and its president for allegedly defamatory remarks made in newspaper articles relating to the qualifications of the new athletic director. The lower court granted summary judgment for defendants on the basis that the statements made were incapable of a defamatory meaning toward the plaintiff. The Pennsylvania Superior Court also found the remark "now we have an athletic director who has respect around the country" to have no defamatory meaning either directly or by innuendo. Summary judgment was affirmed.[25]

A high school baseball coach sued another coach, that coach's school district, a newspaper, and a sports columnist for defamation and intentional infliction of emotional distress. The allegations stemmed from an article which claimed that the plaintiff recruited athletes in violation of interscholastic league rules. The defendant coach was quoted as a source for the article. Summary judgment was granted in favor of the defendant coach and school district since they were immune from these state law claims. The case was remanded to a state court for resolution of the claims against the newspaper and columnist.[26]

Negligence

Participants. In Illinois, an eleven-year-old student suffered injury as he fell from a jungle gym in the school's playground. The plaintiffs sued the school district for negligence in failing to warn of the danger of falling from this equipment. The manufacturer of the equipment was also sued in negligence and strict liability. The appellate court found that no duty existed by the school district or the manufacturer to warn the child because the risk of falling from the apparatus was obvious.[27]

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[24] Fenstermaker v. Nesfedder, 802 F. Supp. 1258 (E.D. Pa. 1992).

[25] Livingston v. Murray, 612 A.2d 443 (Pa. Super. Ct. 1992).

[26] Anderson v. Blankenship, 790 F. Supp. 695 (E.D. Tex. 1992).

[27] *Cozzi* v. North Palos Elementary Sch. Dist., 597 N.E.2d 683 (Ill. App. Ct. 1992).

In another case which found "no duty" to exist, a university lacrosse player died after he suffered cardiac arrest during an off-season practice. The student had no history of heart disease and he did not suffer any contact with another person, stick, or ball prior to his collapse. The plaintiffs alleged that the college failed in its duty to provide prompt medical treatment for its athletes. Using a "foreseeability" analysis, the federal district court found that there was no duty to anticipate and guard against the cardiac arrest of a healthy student-athlete when it occurs in a manner unconnected to the risks of the game.[28]

A third case dealt with the element of duty. A high school student was injured as he tried out for the football team. His mother had signed a permission form and a medical authorization form prior to his participation. However, for some reason, she did not sign nor see the form which required athletes to have their own accident insurance coverage to participate. This parent had no medical coverage for her son and she alleged that the school was negligent in allowing him to participate without obtaining this form. The Ohio appellate court affirmed summary judgment for the school district on the basis that it had no duty to obtain proof that the athlete had medical insurance. There was no evidence to show that this school policy was for the benefit of parents.[29]

In another case from Ohio, a college soccer player was injured by an opposing player. The opponent ran up from behind the plaintiff, knocked him down, and kicked him in the mouth, fracturing his jaw. The plaintiff sued the opposing player for assault and battery and the opposing coach and university for negligence in failing to control the aggressor player. Summary judgment for the university and coach was affirmed because they had no knowledge of previous violent behavior by their player.[30]

In contrast to the above cases which found "no duty" to exist, a Louisiana appellate court found otherwise. A university student suffered paraplegia after he hit a light pole in a parking lot which was at the bottom of a campus hill that was used for sledding. On rehearing, the court found that a duty to protect or warn of injury existed because of the university's ownership of the land and its relationship with the resident students. In this case the university knew that students used this area for sledding despite the fact that there was a danger presented by the light poles at the bottom of the hill. Nonetheless, a bulletin sent out by the housing office encouraged sledding except in another area on campus. This conduct created an illusion of safety which removed/lessened a student's reality of danger. The university should have had warning signs and/or barricades at the top of the hill. It could have encased the poles with bales of hay to prevent injury.[31]

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[28] Kleinknecht v. Gettysburg College, 786 F. Supp. 449 (M.D. Pa. 1992).
[29] Limerick v. Euclid Bd. of Educ., 591 N.E.2d 1299 (Ohio Ct. App. 1990).
[30] Brown v. Day, 588 N.E.2d 973 (Ohio Ct. App. 1990).

There were two cases which dealt with releases. In the first case from Alabama, a high school football coach, who also had grounds maintenance duties, fell through a hole in the floor of the press box in the stadium. He filed a claim with the Board of Adjustment and received an award of $23,000. The check for this amount had release language on the back which clearly stated that he released the state of Alabama and its agencies from all claims arising out of the incident in question. Thereafter the coach sued the Board of Education on the basis that the Board breached its duty to provide a safe place to work. The Alabama Supreme Court affirmed summary judgment for the defendant because the release language prevented a suit against the Board of Education since it was an agency of the state.[32]

In an Indiana case, a high school student was injured as he was hit in the back of the head with a shotput thrown by another student at a regional track meet. The plaintiffs sued two school corporations and the Indiana High School Athletic Association, which sponsored the track meet. The plaintiffs entered into a covenant not to sue with one of the school corporations and signed a general release in favor of the IHSAA. The other school corporation filed a motion for summary judgment arguing that the release of the IHSAA served to release it from liability under the "Release Rule." Under this rule a release of one joint tortfeasor releases all tortfeasors without regard to the express intent of the parties to preserve their claim against other tortfeasors. The Indiana appellate court affirmed summary judgment.[33]

In Pennsylvania, the applicability of the Recreational Use of Land and Water Act (RULWA) to a lacrosse field was addressed. A junior high school lacrosse player was injured in practice as he fell into a hole on the field. The trial court granted summary judgment to the school district on the basis of immunity under the RULWA. The commonwealth court, however, reversed because the field was "improved land" since it was constructed and engineered for athletic competition and had regular maintenance. As such, the school district had no immunity under the RULWA.[34]

The applicability of the recreational use statute also arose in a case from Alaska. Two persons were seriously injured and one person was killed as they used a ski hill on campus to sled. The Alaska Supreme Court held that the ski hill was not "unimproved land" since the hill was maintained and landscaped. Therefore, the recreational use statute was not applicable.[35]

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[31] Pitre v. Louisiana Tech Univ., 596 So. 2d 1324 (La. Ct. App. 1992).

[32] Whitman v. Walker County Bd. of Educ., 591 So. 2d 481 (Ala. 1991).

[33] Huffman v. Monroe County Community Sch. Corp., 564 N.E.2d 961 (Ind. Ct. App. 1991).

[34] Seiferth v. Downingtown Area Sch. Dist., 604 A.2d 757 (Pa. Commw. Ct. 1992).

Six cases related to the question of immunity. In an Illinois case, students took a bicycle trip on a public path. As the instructor cycled about 1/4 mile ahead, one student ran into another on the path. The appellate court held that there was immunity on all public property even if that property was not owned by the public entity being sued (i.e., the school district).[36]

In Montana, a twelve-year-old student was instructed by a teacher to mark the place where shotputs landed. The student was marking one throw when she was hit by a shotput thrown by the teacher. The lower court granted summary judgment on behalf of the school district and the teacher on grounds of statutory immunity. The Montana Supreme Court, however, ruled that the purchase of liability insurance by the school district waived its immunity to the extent of coverage granted by the policy.[37]

On the day after the aforesaid decision was rendered, the Governor of Montana signed a law amending the immunity statute. Based on this statutory amendment the lower court held that the legislative changes did not affect the defendants' immunity. However, the Supreme Court found that the statute altered the immunity concept significantly and that there was now immunity only for "legislative acts." Since there was no legislative act at issue here, there was no immunity for the school district or its staff.[38]

A junior high school student who was injured at track practice sued the school district and the entities which provided the district with limited insurance coverage. Summary judgment for these parties was upheld because the agreement between the insurance cooperative and the school district was not a contract of insurance.[39]

An eleven-year-old was injured when a steel soccer goal was pushed over on him at school. The Michigan appellate court affirmed summary judgment in favor of the principal on immunity grounds since the undisputed facts precluded a finding that his conduct was grossly negligent. The principal had become aware that the goals could be tipped approximately one-to-two weeks before the injury in question. He then asked the maintenance supervisor to determine how to anchor the goals, checked with the supervisor on his progress, and made announcements

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35. University of Alaska v. Shanti-Alaska, 835 P.2d 1225 (Alaska 1992).
36. Castenada v. Community Sch. Dist. Unit #200, 589 N.E.2d 1038 (Ill. App. Ct. 1992).
37. *See* THE YEARBOOK OF EDUCATION LAW 1992 at 149, Hedges v. Swan Lake and Salmon Prairie Sch. Dist. No. 73, 812 P.2d 334 (Mont. 1991).
38. Hedges v. Swan Lake and Salmon Prairie Sch. Dist. No. 73, 832 P.2d 775 (Mont. 1992).
39. Waire v. Joseph, 825 S.W.2d 594 (Ark. 1992).

to the students instructing them to stay off the goals. The principal's conduct could not be construed as gross negligence.[40]

A university student died from heart failure after he was forced to run six miles during a pledge hazing. He ran on the university track that the university made available to the public. The Texas appellate court held that there was no waiver of sovereign immunity; the decision to make the track available to the public and the decision not to supervise were policy decisions which fell within the university's discretionary powers.[41]

The plaintiff was playing in an adult basketball league which rented a school gymnasium from the school district. The participant was knocked into an unpadded concrete wall four feet out of bounds. He received a concussion and spinal injury. The California Court of Appeals found immunity for the school district under a statutory provision which afforded immunity to a public entity from a person injured while participating in a "hazardous recreational activity." The designation of what is a "hazardous recreational activity" is a question of law which the court decided based on its finding that basketball involves rough body contact and carries with it the risk of substantial injury.[42]

Three cases dealt with the issue of the statute of limitations. A student on the track team hurt her knee while running a two-mile race, which her mother told the coach not to allow her to run because of existing knee problems. The mother, on behalf of her daughter, filed a notice of claim which was not timely according to the period set by the Wyoming Governmental Claims Act. The Wyoming Supreme Court felt that it was inequitable to allow the minor who cannot protect herself to suffer because her parent failed to file timely notice. Therefore, the claim was not barred.[43]

A high school football player, eighteen years of age, hurt his wrist in a game, but neither the coach nor trainer referred him to medical attention. The student played the remaining games with this injury and was referred to a doctor only at the conclusion of the season. The student argued that the failure to provide medical care to him in a timely fashion exacerbated the injury, which resulted in two surgeries. On the issue of whether the plaintiff filed his claim within the one-year period prescribed for such claims, the Louisiana appellate court noted that the period did not begin to run until the plaintiff was aware of the damage that had occurred. In this case knowledge did not occur until the student sought medical help and he filed his claim within one year of this consultation.[44]

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[40] Vermilya v. Dunham, 489 N.W.2d 496 (Mich. Ct. App. 1992).

[41] Thomas v. Lamar Univ.-Beaumont, 830 S.W.2d 217 (Tex. Ct. App. 1992).

[42] Yarber v. Oakland Unified Sch. Dist., 6 Cal. Rptr.2d 437 (Ct. App. 1992).

[43] Dye v. Fremont County Sch. Dist. No. 24, 820 P.2d 982 (Wyo. 1991).

[44] Jarreau v. Orleans Parish Sch. Bd., 600 So. 2d 1389 (La. Ct. App. 1992).

In a high school football injury case that spanned a decade, the Illinois appellate court dealt with the issue of whether plaintiffs' amended complaint, which raised the question of wilful and wanton misconduct, should be barred by the statute of limitations. The court held that it was not barred because the amended complaint related back to the original complaint for the purposes of the statute of limitations.[45]

In another high school football case, the issue was whether the high school athletic association had liability insurance for the claim in question. The Ohio Court of Appeals held that the policy clearly excluded coverage for this claim based on the "athletic participants exclusion" clause. The language of the clause was clear that there was no coverage for injuries sustained in an athletic contest.[46]

Finally, there were three baseball cases from New York. In the first, an eleven-year-old boy walked "in front of" or "between" two friends who were playing catch outside the school. The appellate court found that the boy assumed the risk of being hit and that the school district breached no duty of care.[47]

A student was hit in the face with a baseball during practice and he alleged a failure to adequately supervise and direct because two practices were going on simultaneously. In an evidentiary ruling the appellate division held that it was not error for the lower court to exclude that portion of the accident report in which the student's mother claimed that two practices were going on at the same time. This statement was self-serving and hearsay.[48]

A junior varsity baseball player was hit in the eye by a ball during a pre-game warm-up session. He was throwing one ball in to the infield as he was struck by another ball which was hit. The appellate division held that the student assumed the foreseeable risk inherent in the sport that a second ball would be hit into play during warm-ups.[49]

Spectators. A thirteen-year-old spectator at a high school football game was electrocuted as he touched one of the light poles. His death resulted from a short caused by a failure to install a plastic bushing as required by the state electrical code. Claims against the architect, design engineer, or electrical contractor were statutorily precluded because the incident occurred more that ten years after the project was completed. The question on appeal was whether the school district could be liable for the acts of these independent contractors even though the plaintiff could not sue those parties directly.

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[45] Williams v. Board of Educ. Chicago, 584 N.E.2d 257 (Ill. App. Ct. 1991).

[46] United States Fire Ins. Co. v. Ohio High Sch. Athletic Ass'n, 595 N.E.2d 418 (Ohio Ct. App. 1991).

[47] Osborne v. Olean Bd. of Educ., 588 N.Y.S.2d 489 (App. Div. 1992).

[48] Abbe v. Board of Educ., 587 N.Y.S.2d 707 (App. Div. 1992).

[49] Kennedy v. Rockville Centre Union Free Sch. Dist., 587 N.Y.S.2d 442 (App. Div. 1992).

The Supreme Court of New Mexico held that the school district was liable for the acts of its independent contractors because they were engaged in inherently dangerous activities which were nondelegable. However, under the Tort Claims Act, the school district was immune from liability resulting from the breach of a nondelegable duty, because it was strict liability for which the legislature granted immunity.[50]

In Florida, a student waited in his car in the high school parking lot for his girlfriend to return on a bus after an away football game. The school was located in a high crime area and normally a police officer would have been on duty. However, the officer had informed a school administrator that he could patrol only until 10:30 p.m., well before the bus was scheduled to return. At 11:15 p.m. the student picked up his girlfriend and was shot in the head by a person who approached the driver's side of the car on foot. Because the student accelerated the car as the assailant approached, the actual shooting occurred a few feet beyond school property. However, the appellate court held that the duty of a landowner to maintain premises in a reasonably safe condition extended only to the means of ingress/egress and did not end merely because the actual injury occurred beyond the defendant's property line.[51]

The plaintiff attended a football game at the school district's stadium. She fell on the ice on a walkway in front of the bleachers. According to the Pennsylvania Commonwealth Court, summary judgment should not have been granted to the defendant on the "hills and ridges" doctrine.[52]

A parent spectator at a wrestling match was injured as a losing participant threw a folding chair and hit her as she stood near a column in the gymnasium. Summary judgment for the defendant school board was affirmed because there was no fault by the defendant. Security was provided at the match but the actions of the student were sudden, spontaneous, and completely unanticipated. Lack of supervision was, therefore, not the cause of plaintiff's injury.[53]

A parent who was attending her son's track meet at the high school was hit by a shotput as she walked through the shotput landing area. She alleged that others were using this route and that the defendant failed to warn her that the area was being used. The Ohio Court of Appeals affirmed summary judgment for the defendant on the basis of immunity under the Recreational User Statute. Even though she was an observer she was "engaged in recreational pursuits" under the statute.[54]

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50. Saiz v. Belen Sch. Dist., 827 P.2d 102 (N.M. 1992).
51. Gutierrez v. Dade County Sch. Bd., 604 So. 2d 852 (Fla. Dist. Ct. App. 1992).
52. Mahanoy Area Sch. Dist. v. Budwash, 604 A.2d 1156 (Pa. Commw. Ct. 1992).
53. Oast v. Lafayette Parish Sch. Bd., 591 So. 2d 1257 (La. Ct. App. 1991).
54. Rankey v. Arlington Bd. of Educ., 603 N.E.2d 1151 (Ohio Ct. App. 1992).

Educational Malpractice

A former basketball player asserted a number of tort and contract claims against the university that recruited him, although its representatives knew that he was educationally unprepared to attend the school. The federal district court, as it granted defendant's motion to dismiss, denied the availability of tort claims in educational malpractice and negligent infliction of emotional distress. Also, the court was unable to find the breach of an express contractual provision which would give rise to a cause of action.[55] On appeal the Seventh Circuit Court of Appeals affirmed the lower court's dismissal of the tort claims. However, it found that the plaintiff's complaint did state a cause of action in regard to the contract claims.[56] Shortly after this decision the case was settled.

Another former collegiate basketball player brought an action alleging breach of contract, negligence, negligent misrepresentation, fraud, negligent hiring, and violation of civil rights. In part, the plaintiff alleged that the university failed to provide adequate counseling and tutoring, disregarded his progress toward a degree, urged him to register for easy classes, and required him to turn in plagiarized term papers. The federal district court refused to grant summary judgment for the university on the negligent misrepresentation and fraud claims.[57]

Employment

Sixteen cases which dealt with employment issues were decided in 1992. One case dealt with an adverse employment decision, three concerned contract disputes, three were collective bargaining matters, six cases dealt with discrimination issues, two were First Amendment cases, and one was a workers' compensation claim.

Adverse Employment Decisions

Refusal to Renew Coaching Contract. A high school baseball coach was terminated from his position without a hearing. The failure to afford notice and hearing did not violate statutory provisions since a supplemental coaching contract was terminable by either party upon sixty-days notice. Furthermore, the Pennsylvania appellate court held that the above termination clause did not violate public policy.[58]

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[55] *See* THE YEARBOOK OF EDUCATION LAW 1991 at 163, Ross v. Creighton Univ., 740 F. Supp. 1319 (N.D. Ill. 1990).

[56] Ross v. Creighton Univ., 957 F.2d 410 (7th Cir. 1992).

[57] Jackson v. Drake Univ., 778 F. Supp. 1490 (S.D. Iowa 1991).

[58] Moriarta v. State College Area Sch. Dist., 601 A.2d 872 (Pa. Commw. Ct. 1992).

Contract Disputes

A former athletic director alleged that he was hired under an oral employment contract for a period of five years. He was terminated after ten months and the trial court awarded judgment based on the fifty remaining months of the five-year period. The Louisiana appellate court reversed the judgment, as it held that the plaintiff was hired "at will" because there was no meeting of the minds on the five-year period. As an "at will" employee he could be dismissed at any time.[59]

In another employment dispute from Louisiana, a basketball coach who had a written contract for a period of three years was terminated early. Shortly thereafter the coach and the university entered into a written compromise agreement with a confidentiality clause. The plaintiff filed suit within a year alleging that he was fraudulently induced to sign the agreement and that the defendant failed to perform an oral agreement, which was entered into at the time of the written agreement. The trial court granted summary judgment for the defendant based on the parol evidence rule, which precludes the alteration of a written agreement. The appellate court reversed because the defendant admitted that there was an oral agreement in existence and that the compromise document referred to this agreement. Also, the parol evidence rule does not prevent evidence which relates to fraud.[60]

The South Dakota Supreme Court held that the defendant school board did not violate provisions of the continuing contract law by requiring teachers to accept contracts for teaching loads and extracurricular assignments at the same time. Also, the due process requirements of the continuing contract law were equally applicable to extracurricular contracts.[61]

Collective Bargaining

A high school basketball coach was terminated from his coaching assignment. He filed a grievance alleging that the collective bargaining agreement was violated by a failure to give due process. The arbitrator ordered the district to restore the coach to his coaching position. The Illinois appellate court held that the arbitrator exceeded his authority in considering a "just cause" standard as necessary for dismissal.[62]

In Illinois, a high school football coach was terminated without "good cause" contrary to the provisions of the collective bargaining agreement. The arbitration award ordered reinstatement of the coach for one year. The district reinstated the coach with back pay in January 1991 but did so for the 1990-91 school year, which meant that the football season was already over. The appellate court found that this was a *bona fide* reinstatement because the fact that the football season was over was not determinative of the issue. There are still coaching-related activities in the off-season to perform and the coach was placed in the same position he held prior to his termination.[63]

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[59] Brodhead v. Board of Trustees of State Colleges and Univs., 588 So. 2d 748 (La. Ct. App. 1991).

[60] Tolis v. Board of Supervisors of Louisiana State Univ., 602 So. 2d 99 (La. Ct. App. 1992).

[61] Lemmon Educ. Ass'n v. Lemmon Sch. Dist. No. 52-2, 478 N.W.2d 821 (S.D. 1991).

[62] Board of Educ. of Harrisburg Community Unit Sch. Dist. No. 3 v. Illinois Educ. Labor Relations Bd., 591 N.E.2d 85 (Ill. App. Ct. 1992).

A teacher/coach claimed that the board of education improperly refused to renew his supplemental coaching contracts. The Ohio Court of Appeals held that no hearing was required because there was no entitlement of renewal. This was unambiguously stated in the collective bargaining agreement and in the supplemental contract itself.[64]

Discrimination

Race. A white basketball coach at a community college was terminated. Thereafter, he filed an action against the college and a number of individual defendants including the president and the new head coach. The plaintiff argued that he was discriminated against because the president hired blacks regardless of qualifications and that he was terminated simply because the president wanted his assistant coach, who was black, to have the head coaching position. The federal district court held that the college had sovereign immunity under the Eleventh Amendment. However, the individual defendants were not entitled to qualified immunity on the question of racial discrimination since the actions taken here were not in "objective good faith."[65]

A black high school basketball coach who was released from his coaching duties alleged that his dismissal was based on racial discrimination. The Illinois appellate court, however, held that he was unable to make out a *prima facie* case because he was not satisfying the normal requirements of his job, which included fostering cooperative relationships with the community and with his players.[66]

Gender. A female physical educator coached the co-ed high school tennis team for five years. When the school created separate tennis teams she applied to coach both teams since the seasons did not overlap. She was appointed to coach the girls' team but a male was chosen to coach the boys' team.

The female coach brought a sex discrimination complaint with the State Division of Human Rights, which found that the district used absences from school (11 and 1/2 days) as a pretext to deny her application to coach the boys' team. The New York appellate court, however, found that this determination was irrational because it ignored the fact that a male teacher was also denied a coaching position due to excessive absenteeism.[67]

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[63] People *ex rel.* Ill. Educ. Labor Relations Bd. v. Oregon Community Unit Sch. Dist. 220, 599 N.E.2d 95 (Ill. App. Ct. 1992).

[64] Holthaus v. Cincinnati Bd. of Educ., 602 N.E.2d 360 (Ohio Ct. App. 1991).

[65] Folse v. Delgado Community College, 776 F. Supp. 1133 (E.D. La. 1991).

[66] Parham v. Macomb Unit Sch. Dist. No. 185, 596 N.E.2d 1192 (Ill. App. Ct. 1992).

An elementary school teacher's contract was not renewed for financial reasons. Thereafter, the school district advertised for a fourth grade teacher who could also coach. The plaintiff was not considered for this position because she could not coach. She alleged that it was sexually discriminatory to combine the teaching position with the coaching position because it obviously excluded females from consideration. The North Dakota Supreme Court found that there was nothing in the hiring practices at the school to suggest that qualified females were excluded from coaching positions.[68]

Sexual Orientation. An applicant for a teaching/coaching position alleged that he was denied the position based on the principal's perception that he had "homosexual tendencies." He brought a section 1983 action against the principal and the school district. According to the Tenth Circuit Court of Appeals, the principal was entitled to qualified immunity because, in 1988 when this incident occurred, there was no clearly established line of authority proscribing an adverse action against job applicants based on homosexual orientation. Therefore, any unlawfulness in the principal's actions was not "apparent" in 1988.[69]

First Amendment

A high school basketball coach did not have his coaching contract renewed after nine years. The coach alleged that this action was taken because of an article in the local paper in which he was quoted as saying there was a lack of financial support by the district. This action allegedly violated his First Amendment right of free speech.

Using the precedent of *Connick v. Myers*[70] speech is not protected unless it relates to a matter of public concern. In this case, the article in question was not an attempt to arouse public debate nor to promote a cause. Therefore, in looking at the "subjective intention" of the speaker, this speech did not concern a matter of public interest and was not constitutionally protected.[71]

A high school basketball and softball coach alleged that she lost her coaching positions in retaliation for statements she made in the faculty newspaper about poor faculty morale. The Third Circuit Court of Appeals held that she was not entitled to First Amendment protection since her statements were not matters of public concern. She did not comment on any matters of broad social or policy issues. Her statements focused simply on employee morale.[72]

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[67] New Paltz Cent. Sch. Dist. v. State Div. of Human Rights, 577 N.Y.S.2d 510 (App. Div. 1991).

[68] Kent v. Sawyer Pub. Sch. Dist. No. 16, 484 N.W.2d 287 (N.D. 1992).

[69] Jantz v. Muci, 976 F.2d 623 (10th Cir. 1992).

[70] 461 U.S. 138 (1983).

[71] Adkins v. Stow City Sch. Dist. Bd. of Educ., 591 N.E.2d 795 (Ohio Ct. App. 1990).

Workers' Compensation

The claimant in this case injured her knee as she played donkey basketball on a faculty team which was a voluntary event. The school argued that her claim was not causally related to employment. However, according to the New York appellate court, she participated only because the principal solicited teachers to do so. This overt encouragement constituted school sponsorship and her injury was covered under the workers' compensation law.[73]

Miscellaneous

Public Records

The Supreme Court of Kentucky dealt with the question of whether a state university's response to an official inquiry of the NCAA was subject to disclosure under the state Open Records Act. The entire response was a public record subject to disclosure. Since this was a final action of the university there was no statutory exemption available for "preliminary investigative materials."[74]

In North Carolina, a commission was appointed by the president of the system of higher education to investigate and report on alleged improprieties of the North Carolina State basketball team. There were investigative reports prepared for the commission by the State Bureau of Investigation. The media sought disclosure of this investigative report, the commission minutes, and draft reports of the commission. The Supreme Court affirmed the trial court's order of disclosure for all this material, with the exception of attorney-client communications in the minutes (revealed written communications from counsel to the commission).[75]

The plaintiff, who was admitted to the University of Arkansas but had not yet enrolled, sought disclosure of documents relating to the investigation of criminal activity by university basketball players in the athletic dormitory. The federal district court dismissed the claim for

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72. Sanguigni v. Pittsburgh Bd. of Pub. Educ., 968 F.2d 393 (3d Cir. 1992).
73. Midey v. Romulus Cent. Sch. Dist., 584 N.Y.S.2d 948 (App. Div. 1992).
74. University of Ky. v. Courier Journal & Louisville Times Co., 830 S.W.2d 373 (Ky. 1992).
75. News and Observer Publishing Co. v. Poole, 412 S.E.2d 7 (N.C. 1992).

lack of federal jurisdiction since she had no First Amendment right of access nor could she gain any rights under FERPA. This was simply a matter of state law under the state Freedom of Information Act.[76]

The plaintiff sought disclosure of records pertaining to a legislative study of abuses in school sports in Illinois. The plaintiff failed to obtain relief because the records were lost, but he argued that he should be able to recover attorney fees because he "substantially prevailed" on his claim. The appellate court held that the defendants had a reasonable basis in fact for failing to furnish the records, so the refusal to furnish was not a violation of the Freedom of Information Act. The plaintiff did not "substantially" prevail and was not entitled to attorney fees.[77]

Taxation

A whitewater rafting operator disputed the school district's authority to assess an amusement tax upon its patrons. The rafting company was a licensee of the Commonwealth of Pennsylvania and offered trips on a river in the state park. The Pennsylvania Supreme Court affirmed the right of the school district to assess these taxes.[78]

Divorce

A divorced couple agreed, in 1977, to continue to split their rights to season tickets to the University of Kentucky basketball games. This arrangement worked well for eleven years until the husband refused to continue the arrangement. The Kentucky appellate court reversed the trial court which awarded the rights to the tickets to the husband after the 1991-92 season. There was no time frame for the termination of the agreement discussed at the time it was entered into and it was an abuse of discretion to award the tickets to the husband, since there was no evidence to show that the tickets were any more his than hers. The appellate court remanded with directions to enforce the agreement as originally contemplated.[79]

Zoning

A school requested a variance to build two pools to be used primarily for recreational activities in conjunction with its summer academic program. The zoning board's denial of the application was held to be arbitrary and capricious since it was not based on sufficient evidence regarding adverse effects in the community.[80]

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76. Norwood v. Slammons, 788 F. Supp. 1020 (W.D. Ark. 1991).
77. Workmann v. Illinois State Bd. of Educ., 593 N.E.2d 141 (Ill. App. Ct. 1992).
78. Weatherly Area Sch. Dist. v. Whitewater Challenges Inc., 616 A.2d 620 (Pa. 1992).
79. Wagner v. Wagner, 821 S.W.2d 819 (Ky. Ct. App. 1991).
80. Lawrence Sch. Corp. v. Lewis, 578 N.Y.S.2d 627 (App. Div. 1992).

Wiretapping

A university basketball player sued the assistant coach at another university alleging that the coach violated the Illinois eavesdropping statute and the federal wiretapping statute when he recorded a phone conversation he had with the player. The disclosures made in this conversation led to an NCAA investigation of the player and his school. The federal district court granted defendant's motion for summary judgment, because a person who is a party to a communication may intercept it unless the purpose of the recording was the commission of a crime or tort (e.g., blackmail, defamation). Since that was not the case here, the federal wiretapping statute did not apply to preventing the recording nor did the Illinois eavesdropping statute apply since the assistant coach had legitimate access to the conversation.[81]

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[81] Thomas v. Pearl, 793 F. Supp. 838 (C.D. Ill. 1992).

7

HIGHER EDUCATION

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Introduction

The case law involving higher education continues to increase in frequency. Over 550 cases were located and reviewed in the preparation of this chapter. There are some interesting issues that stand out this year. For example, a standardized testing corporation challenged a New York law requiring the release of testing information. Animal rights groups have continued to attempt to use sunshine laws to open to public scrutiny committees charged with the protection of animal rights in experimentation.

The Supreme Court finally ruled on the determination of enforcement policies under title VI aimed at the disestablishment of dual systems of higher education. A lower court ruled on whether Alabama had met its obligation to break down its dual system of higher education. Other discrimination issues included an increase in the number of cases surrounding sexual harassment.

Student issues continue with heavy litigation in the collection and policy issues surrounding the award of financial aid. Of particular interest is the high volume of cases involving child support from divorced parents with children enrolled in a college or university. Also of high interest is the court's ruling on a Wisconsin university's "hate speech policy." Another case involved whether it was legal for colleges to use social security numbers for student identification numbers. Finally, AIDS-related litigation was manifest in the academic dismissal of a medical student.

Liability cases and those involving patents, copyrights, and wills round out the chapter. Liability litigation in several of the areas continues to be heavy and, with the other issues, reflects the litigious nature of society in the last third of this century.

Intergovernmental Relations

Relationships between institutions of higher education and governmental entities continue to be an area of significant litigation. Issues include questions of the authority of various governmental entities including the institutions and their boards. Questions surround issues such as licensing procedures, accreditation, sunshine laws, taxation, and zoning. Constitutional questions on separation of church and state, other First Amendment questions, and equal protection are addressed in this year's cases. Criminal charges, jurisdictional questions, and issues involving affiliate enterprises such as hospitals complete the case law review in this section.

Legislative Authority

Legislative authority in the development of legislation was before the courts in several cases. A New York law required the providers of standardized tests to file with a state commission, within thirty days of the release of the test's results, the questions, correct answers, and all rules used to convert raw scores to reported scores. A federal district court granted summary judgment to the state finding that the requirements of the commission were reasonable and did not pre-empt the federal copyright laws.[1] An Alabama case involved the governor's attempt to line item veto several sections of the legislature's higher education appropriations bill. The state supreme court ruled that the governor could not exercise the line item veto after the end of the legislative session.[2] A legislative act to change the election of community college district trustees to specific districts, as opposed to an at-large election by the total district and allowing a state agency to draw the specific district boundaries, was not an abuse of legislative discretion.[3] Finally, the Federal Fair Labor Standard Act does not apply to proprietary institutions as "retail establishments" as defined in the Act and, therefore, would not require overtime wages for admissions counselors.[4]

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[1] College Entrance Examination Bd. v. Cuomo, 788 F. Supp. 134 (N.D.N.Y. 1992).

Agency and Board Authority

The authority of federal agencies was implicated in a suit involving The National Institute of Health. A California graduate student, after being unable to replicate encouraging data released by another researcher under an NIH grant, filed a suit under the Federal False Claims Act.[5] A federal circuit court of appeals ruled that the United States could join the action as an interested party, while Eleventh Amendment immunity was not a valid claim in this case.

The authority of state agencies, in their relationship with higher education, involved funding questions in several cases. A California association petitioned to prevent state officials from including the funding of a child care bill within the education appropriations. The court found that child care had an educational mission allowing it to be funded through funds earmarked for education.[6] Minnesota faculty challenged the governor's veto of specific budgetary items at specific institutions within the legislative appropriations for the state system of higher education. The state supreme court ruled that the items vetoed were estimates, not specific appropriations, and that the governor had authority only to veto total appropriations to the college system.[7] The state's authority to inspect the financial records of a foundation affiliated with a state college was again in the courts.[8] The state supreme court ruled that the foundation was not a public entity and, therefore, the state had the authority to inspect only records involving public funds.[9] In a case involving the refund of federal money, South Dakota had nothing to appeal when the United States Secretary of Education remanded the controversy to the administrative law judge for further adjudi-cation.[10]

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[2] Hunt v. Hubbert, 588 So. 2d 848 (Ala. 1991).

[3] Pidgeon v. State Bd. of Elections, 600 N.E.2d 858 (Ill. App. Ct. 1992).

[4] Martin v. The Refrigeration Sch., 968 F.2d 3 (9th Cir. 1992).

[5] United States *ex rel.* Milam v. University of Tex. M.D. Anderson Cancer Center, 961 F.2d 46 (4th Cir. 1992).

[6] California Teachers Ass'n v. Huff, 7 Cal. Rptr.2d 699 (Cal. Ct. App. 1992).

[7] Inter Faculty Org. v. Carlson, 478 N.W.2d 192 (Minn. 1991).

[8] *See* THE YEARBOOK OF EDUCATION LAW 1991 at 192, State v. Nicholls College Found., 564 So. 2d 682 (La. 1990).

[9] State *ex rel.* Guste v. Nicholls College Found., 592 So. 2d 419 (La. Ct. App. 1991).

City governmental authority was also before the courts this year. Littleton, Colorado, was found to be without authority to collect storm water drainage fees from the state as the owner of a local community college.[11] The court also affirmed the awarded attorney's fees to the state in the case. Ellensburg, Washington, had entered into a contract with the state to provide fire protection services for a local state university. The court found that while the state must contract with the city for such services, there was nothing in the law requiring them to pay the full cost for the provision of those services.[12]

The structure and authority of boards of trustees of colleges and universities was also before the courts. The Kentucky State Attorney General brought an action to stop the swearing in of the governor as a member of the board of a state university as per the governor's executive order. The state supreme court reversed the lower court's grant of a temporary injunction to the Attorney General, and found that the lower court abused its discretion.[13] In a California case, the total cost of running an election, which would have been incurred anyway, could not be charged to a community college district whose board members were on the ballot.[14]

In the question of a private university board's decision to discontinue an academic program, a state court ruled that while the bulletin was a contract, it could contain provisions to eliminate programs at any time.[15] The institution was found to have acted in good faith and with reasonable notice in arriving at the decision.[16] The board of a Georgia military college was found free of conspiracy to get a local savings and loan officer fired for negative comments about the board.[17]

Licensing and Accreditation. The licensing of institutions of higher education and professionals for practitioner status was also before the courts. Several cases involved either the refusal to grant, or the revocation of, a professional license to practice. These cases involved inadequate education to receive a license,[18] failure to properly record services for Medicare patients,[19] the suspension of a license after operating a motor vehicle while intoxicated,[20] and alleged denial of due process.[21] A dentist, previously convicted for child sexual abuse, was not given due consideration of new circumstances on his reapplication for a license to practice.[22] The denial of the use of a medical diploma from a foreign medical school was not within the licensing agency's authority, in a case involving a Doctor of Osteopathy who also used the title M.D.[23]

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[10] South Dakota v. Alexander, 968 F.2d 1 (8th Cir. 1992).

[11] City of Littleton v. State, 832 P.2d 985 (Colo. Ct. App. 1991).

[12] City of Ellensburg v. State, 826 P.2d 1081 (Wash. 1992).

[13] Commonwealth *ex rel.* Cowan v. Wilkinson, 828 S.W.2d 610 (Ky. 1992).

[14] County of Yolo v. Los Rios Community College Dist., 7 Cal. Rptr.2d 647 (Cal. Ct. App. 1992).

[15] Beukas v. Board of Trustees of Fairleigh Dickinson Univ., 605 A.2d 708 (N.J. Super. Ct. App. Div. 1992).

[16] Beukas v. Board of Trustees of Fairleigh Dickinson Univ., 605 A.2d 776 (N.J. Super. Law Div. 1991).

[17] Burrell v. Board of Trustees of Ga. Military College, 970 F.2d 785 (11th Cir. 1992).

A Colorado licensing agency did not deny due process when, after warnings, it removed a trade school's license to operate.[24] A New York court found that the removal of a cosmetology school's license was not arbitrary and capricious.[25] However, a federal district court allowed the action by a proprietary school against a New York licensing agency to be amended to include claims of violations of First Amendment rights in regulation of curricular content.[26]

The withdrawal of accreditation resulting from the bankruptcy proceedings of two proprietary schools was upheld by two courts.[27] The federal circuit court ruled that the lower court erred in failing to give sufficient deference to a state commission's decision to remove accreditation for one year.[28] The appellate court also vacated the injunction against the accrediting commission.

Sunshine Laws. Sunshine laws continue to be heavily litigated. A number of cases raise questions about whether the proceedings of animal rights committees established under federal laws need to be subject to state sunshine laws. In one case where students were successful in applying sunshine laws to the animal rights committee,[29] the court ruled that the students were not eligible for attorney fees under the act.[30] However, a number of state courts have found that animal rights committees established under federal law failed to be covered by state sunshine provisions.[31] A Massachusetts case resulted in a similar ruling.[32] In Oregon, an animal rights group was found to lack standing as the aggrieved party in a suit to seek an injunction against committee approval of an auditory experiment using barn owls.[33] Another Oregon case involving approval of cranial surgery on monkeys awaits a decision on the merits after the appellate court found that students could challenge the committee's procedures in light of open meeting law requirements.[34] Finally, an Ohio court found that the court of common pleas had jurisdiction in a case where the student group asked for monetary damages in an alleged violation of sunshine laws by an animal rights committee at Kent State.[35]

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[18] Ferro v. Utah Dep't of Commerce Div. of Occupational and Professional Licensing, 828 P.2d 507 (Utah Ct. App. 1992).

[19] Camperlengo v. Barell, 585 N.E.2d 816 (N.Y. 1991).

[20] McCarthy v. Board of Regents of State of N.Y., 576 N.Y.S.2d 649 (App. Div. 1991).

[21] Greenberg v. Board of Regents of Univ. of State of N.Y., 575 N.Y.S.2d 608 (App. Div. 1991).

[22] Melone v. State of N.Y. Educ. Dep't, 581 N.Y.S.2d 894 (App. Div. 1992).

[23] Lobacz v. Sobol, 574 N.Y.S.2d 840 (App. Div. 1991).

[24] National Camera, Inc. v. Sanchez, 832 P.2d 960 (Colo. Ct. App. 1991).

[25] Blake Business Sch., Inc. v. Sobol, 575 N.Y.S.2d 955 (N.Y. App. Div. 1991).

[26] New York State Ass'n of Career Sch. v. State Educ. Dep't, 142 F.R.D. 403 (S.D.N.Y. 1992).

[27] Statewide Oilfield Constr., Inc. v. Career College Ass'n., 134 B.R. 399 (Bankr. E.D. Cal. 1991); Black v. Barnes, 776 F. Supp. 1000 (M.D. Pa. 1991).

[28] Wilfred Academy of Hair and Beauty Culture, Houston, Tex. v. Southern Ass'n of Colleges and Sch., 957 F.2d 210 (5th Cir. 1992).

[29] *See* THE YEARBOOK OF EDUCATION LAW 1992 at 173, S.E.T.A. UNC-CH, Inc. v. Huffines, 399 S.E.2d 340 (N.C. Ct. App. 1991).

[30] S.E.T.A. UNC-CH, Inc. v. Huffines, 420 S.E.2d 674 (N.C. Ct. App. 1992).

Several cases involved access to investigations of impropriety or violation of NCAA rules in collegiate athletics. A Kentucky case involved a newspaper's attempt to gain access to an investigation of a university's athletic programs. The court found that an investigation prepared by the president of the institution was a matter of public record to be released to the newspaper.[36] An inquiry by a state investigating agency into a North Carolina university's basketball program was a matter of public record.[37] However, personnel files and attorney-client written communications were exceptions to the disclosure order. Similar to athletic investigations, a Kentucky newspaper was able to gain access to a state university foundation's records of gift giving since it is a public agency subject to the opened records law.[38] However, a Michigan court ruled that the addresses of donors were privileged information exempt from disclosure.[39]

An Ohio court also ruled that police records of campus incidents, which were recorded on magnetic tape, were public records and that individuals can demand access to such tapes, if they can substantiate that access to the tapes is necessary, even when a paper copy is available.[40] A citizen was unsuccessful, under the state's Freedom of Information Act, in obtaining course materials on a community college course on human sexuality.[41] A defendant in a traffic case was successful, under the Open Records Act, in gaining access to a police accident report and the narrative of the police officer's report.[42] However, a female student was unsuccessful in gaining access to a police report on a sexual assault involving a number of athletes. She alleged First Amendment rights to public access, and claimed that the report would help her evaluate the quality of police protection and her future safety on campus.[43]

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[31] ASPCA v. Board of Trustees of the State Univ. of N.Y., 582 N.Y.S.2d 983 (N.Y. 1992), *aff'd*, ASPCA v. Board of Trustees of State Univ. of N.Y., 591 N.E.2d 1169 (N.Y. 1992); *see* THE YEARBOOK OF EDUCATION LAW 1992 at 173, ASPCA v. Board of Trustees of State Univ. of N.Y., 568 N.Y.S.2d 631 (App. Div. 1991); *see also* ASPCA v. Board of Trustees of State Univ. of N.Y., 584 N.Y.S.2d 198 (App. Div. 1992).

[32] Medlock v. Board of Trustees of the Univ. of Mass., 580 N.E.2d 387 (Mass. App. Ct. 1991).

[33] People for the Ethical Treatment of Animals v. Institutional Animal Care and Use Comm. of the Univ. of Or., 817 P.2d 1299 (Or. 1991).

[34] Students for Ethical Treatment of Animals v. Institutional Animal Care and Use Comm. of the Univ. of Or., 833 P.2d 337 (Or. Ct. App. 1992).

[35] Vlach v. Kent State Univ., 591 N.E.2d 348 (Ohio Ct. App. 1990).

[36] University of Ky. v. Courier-Journal and Louisville Times Co., 830 S.W.2d 373 (Ky. 1992).

[37] News and Observer Publishing Co. v. Poole, 412 S.E.2d 7 (N.C. 1992).

[38] Frankfort Publishing Co. v. Kentucky State Univ. Found., Inc., 834 S.W.2d 681 (Ky. 1992).

[39] Clerical-Technical Union of Mich. State Univ. v. Board of Trustees of Mich. State Univ., 475 N.W.2d 373 (Mich. Ct. App. 1991).

Taxation. Taxation issues were before the courts in several communities. The lead off case for this section involved state legislation requiring a community college district to collect property tax from all county residents to finance the community college, with any excess given to the public university located within the county.[44] The court found that this special legislation was prohibited by a state constitutional bar against special legislation. Cornell University held the mineral rights on a property, which the surface property owner lost due to failure to pay taxes. The court found that the University had received proper notice, should have acted, but lost any claim to the mineral rights when the deed to the land was taken by the county.[45] When the city of Chicago realigned itself as a plaintiff, and taxpayer plaintiffs remained in the claim as monitors, their attorney could not petition for attorney fees after an out-of-court settlement with the City.[46]

Several cases involved questions of whether institutional property could be subjected to taxes. A camp owned by the alumni association of a midwestern university, used to conduct physical education programs, was exempt from taxation because its primary use was for educational purposes.[47] Use as an alumni family campground did not compromise its educational purpose. A charitable school was found to be exempt from St. Louis city license tax.[48] A convention center at a private university was devoted primarily to educational programs, exempting it from the city's hotel-motel tax.[49] Land owned by a public institution and leased to a private landlord for one dollar to be used for parking was not property used to acquire profit and would not lose its tax exempt status.[50] However, property leased to faculty, upon which was built a place of private residence, was not property exempt from taxes when used solely for educational purposes.[51] A case involving a private college reached a similar result.[52] In Pennsylvania, a community college established under the Community College Act was not an "instrumentality of the commonwealth" and therefore not tax exempt.[53] Finally, a nonprofit private foundation offering accounting courses to its members was not a nonprofit education institution exempt from taxes under the tax code.[54]

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[40] State *ex rel.* Margolius v. City of Cleveland, 584 N.E.2d 665 (Ohio 1992).
[41] Russo v. Nassau County Community College, 587 N.Y.S.2d 419 (App. Div. 1992).
[42] Wisconsin *ex rel.* Young v. Shaw, 477 N.W.2d 340 (Wis. Ct. App. 1991).
[43] Norwood v. Slammons, 788 F. Supp. 1020 (W.D. Ark. 1991).
[44] Horry County v. Horry County Higher Educ. Comm'n, 412 S.E.2d 421 (S.C. 1991).
[45] Cornell Univ. v. Rusk County, 481 N.W.2d 485 (Wis. Ct. App. 1992).
[46] Baksinski v. Northwestern Univ., 595 N.E.2d 1106 (Ill. App. Ct. 1992).
[47] Trustees of Ind. Univ. v. Town of Rhine, 488 N.W.2d 128 (Wis. Ct. App. 1992).
[48] David Ranken, Jr. Tech. Inst. v. Boykins, 816 S.W.2d 189 (Mo. 1991).
[49] Northwestern Univ. v. City of Evanston, 582 N.E.2d 1251 (Ill. App. Ct. 1991).

Zoning. Zoning controversies were also in the courts. The Oklahoma Supreme Court found that the state's Beverage Law Enforcement Commission was consistent with state statutes when it denied a mixed beverage license to a club located within 300 feet of a university.[55] A District of Columbia court upheld the Board of Zoning Adjustment decision to allow a university an exception to zoning laws in order to build both a new library and a law school.[56] The court found that the zoning board was most accommodating to all local neighborhood association concerns.

Environmental Impact. Several cases involved environmental impact questions. In one case, the court found that a California university had failed to give proper public notice of hearings on the environmental impact of its long-range plans.[57] A case involving the construction of a series of large telescopes on several mountains in Arizona eventually involved congressional legislation. The project, involving the University of Arizona, also held the interest of the international scientific community. An environmental group, in an effort to save the endangered Mount Graham Red Squirrel, became involved in litigation to stop the construction, invoking provisions within the Endangered Species Act. Eventually Congress passed a bill prescribing guidelines under which the telescopes could be built, while also accommodating the Endangered

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[50] Bexley Village, Ltd. v. Limbach, 588 N.E.2d 246 (Ohio Ct. App. 1990).

[51] Connolly v. County of Orange, 824 P.2d 663 (Cal. 1992); *see* THE YEARBOOK OF EDUCATION LAW 1991 at 195, Connolly v. County of Orange, 272 Cal. Rptr. 186 (Ct. App. 1990).

[52] Bexar Appraisal Dist. v. Incarnate Word College, 824 S.W.2d 295 (Tex. Ct. App. 1992).

[53] Bucks County Community College v. Bucks County Bd. of Assessment App., 608 A.2d 622 (Pa. Commw. Ct. 1992).

[54] PICPA Found. for Educ. & Research v. Commonwealth of Pa., 598 A.2d 1078 (Pa. Commw. Ct. 1991).

[55] J. Brotton Corp. v. Oklahoma Alcoholic Beverage Laws Enforcement Comm'n, 822 P.2d 683 (Okla. 1991).

[56] Glenbrook Rd. Ass'n v. District of Columbia Bd. of Zoning Adjustment, 605 A.2d 22 (D.C. 1992).

[57] West Davis Community Ass'n v. Regents of Univ. of Cal., 2 Cal. Rptr.2d 888 (Ct. App. 1991).

Species Act. The federal circuit court ruled that the environmental group was not entitled to halt construction of the first phase of the project approved under the provisions of the congressional act.[58]

Jurisdiction. Questions of jurisdiction and criminal procedures encompass several issues. The Supreme Court of Pennsylvania ruled that the conviction of a fraternity supplying beer to minors could not be upheld unless chemical analysis of the contents of the bottles was completed to determine whether it was, in fact, an alcoholic beverage.[59] The local police had relied on the testimony of officers asserting that the bottles' contents smelled and tasted like alcoholic beverages. In an Arizona case involving an arrest, the court found that the university had the authority to establish a police department.[60] A Rhode Island court found that university police officers possessed arrest powers like other police departments.[61]

Several cases had somewhat unique twists. For example, a federal court struck down a Nevada statute as a violation of contract and commerce clauses of the United States Constitution.[62] The statute defined the procedures to be followed in the investigation of athletic infractions at state colleges and universities, which conflicted with the NCAA's contracted investigative procedures. A federal appeals court ruled that a tenant who suffered from diminished use of an apartment because of student drug trafficking next door, could not recover damages under the Racketeer Influence and Corrupt Organizations Act.[63] Court-ordered sanctions against an attorney were reduced, the sanctions because the actions involved were no more disruptive then those of the defense counsel.[64] The court also denied defense counsel's request for fees in this sanction action. In another attorney fees case, the court denied the plaintiff's request after the plaintiff successfully challenged a live animal surgery curriculum, and the university altered its curriculum before litigation commenced.[65] Two cases involved state sovereign immunity. In Texas, a visitor could not challenge a parking ticket and impoundment of an automobile,[66] and an Illinois university employee's equal protection claim was barred.[67] Finally, an arrest within 500 yards of the campus boundary was within the campus and the jurisdiction of the institution's police.[68]

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[58] Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441 (9th Cir. 1992).

[59] Commonwealth v. Epsilon, 609 A.2d 791 (Pa. 1992).

[60] Goode v. Alfred, 828 P.2d 1235 (Ariz. Ct. App. 1991).

[61] State v. Harris, 609 A.2d 944 (R.I. 1992).

[62] National Collegiate Athletic Ass'n v. Miller, 795 F. Supp. 1476 (D. Nev. 1992).

[63] Oscar v. University Students Coop. Ass'n, 965 F.2d 783 (9th Cir. 1992).

[64] Derechin v. State Univ. of N.Y., 963 F.2d 513 (2d Cir. 1992).

[65] Kissinger v. Board of Trustees of Ohio State Univ., 786 F. Supp. 1308 (S.D. Ohio 1992).

[66] Sparks v. Texas Southern Univ., 824 S.W.2d 328 (Tex. Ct. App. 1992).

[67] Tomblin v. Chicago State Univ., 795 F. Supp. 270 (N.D. Ill. 1992).

Ownership. Ownership questions were also litigated. A very unique case involved the ownership of season tickets to college basketball. In a divorce settlement, spouses agreed to share the two tickets, with each attending half the games. When the former wife was late sending her check for her share of the cost of the tickets, the husband refused to share the tickets, declaring the agreement void. The court found the agreement still in force as terms for termination had not been spelled out.[69] In a question of easement rights of a college and its neighbors, the court found that one property owner lost his easement rights when he erected a fence at the edge of the easement land boundary.[70] However, the college, which for a number of years allowed an adjacent property owner's fence to close off access to its easement, had not abandoned its easement rights.

University Hospitals. University affiliated hospitals were involved in several claims for collection of moneys from various federal programs, patients, and dissolved partnerships with medical doctors. An Ohio university attempted to be reimbursed by Medicare for administrative costs in operating a Medicare-approved graduate medical education program. The court ruled that the hospital was due reimbursement even when actual costs were the medical school's, which operated the intern and residence program for the hospital.[71] A New York university objected to the reimbursement rate under Medicaid, Medicare, and Blue Cross. The court ruled that the teaching hospital was unable to show why its reimbursement rate should be different from other public hospitals.[72] A Missouri university was unable to establish that the Provider Reimbursement Review Board had jurisdiction over its appeal for the payment for services rendered in a joint arrangement with the Veteran's Services Administration.[73] The fact that time had elapsed precluding collection from the patient was not, in the court's mind, enough to change the outcome of this case.[74] In Tennessee, a federal district court ruled that student nurses were employees, requiring the hospital to pay Social Security tax.[75] A Florida court ruled that a law requiring binding arbitration in malpractice suits violated the constitutional right to litigate in court.[76] A patient's successful tort claim against a third party did not result in the reduction of the hospital's debt by subtracting court costs and attorney fees.[77] However, for comparative negligence, the amount of the debt to the hospital could be reduced. Finally, a hospital was not entitled to a share of a withdrawing partner's receivables as a result of the dissolution of a doctor-hospital affiliation agreement.[78]

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[68] Tabor v. State, 416 S.E.2d 138 (Ga. Ct. App. 1992).

[69] Wagner v. Wagner, 821 S.W.2d 819 (Ky. Ct. App. 1992).

[70] Lasell College v. Leonard, 589 N.E.2d 342 (Mass. App. Ct. 1992).

[71] Ohio State Univ. v. Sullivan, 777 F. Supp. 582 (S.D. Ohio 1991).

[72] University Hosp. v. New York State Dep't of Health, 579 N.Y.S.2d 205 (App. Div. 1992).

[73] Curators, Univ. of Mo. v. Sullivan, 963 F.2d 220 (8th Cir. 1992).

[74] *Id.* at 222.

[75] Johnson City Medical Center Hosp. v. United States, 783 F. Supp. 1048 (E.D. Tenn. 1992).

Criminal Prosecutions. Criminal prosecutions were litigated in several cases involving colleges and universities. A federal district court upheld the mail fraud conviction of an athletic agent and ruled that the retrial was not double jeopardy.[79] The president of a proprietary school was found not guilty of misuse of financial aid funds.[80] The director of an Arkansas career education board had an unlicensed instructor arrested after he ceased collecting money for an impending seminar and attempted to return to his home state. On appeal, the court reversed a lower court summary judgment for the director, finding that her arrest order was based on knowingly giving false information.[81] In a New York case involving false arrest, the court ruled that damages for pain and mental anguish were reasonable, but damages for compensation and punitive damages were excessive and were reduced.[82] In a Texas case involving the arrest of a faculty member for lack of proper identification at university registration, the federal appeals court found that the police officers lacked probable cause and that the excessive force standard enforced at the time of trial should be used in the litigation.[83] Finally, a case involving a basketball recruit and a public university coach's recording of a conversation did not implicate state action when he was complying with NCAA regulations.[84] The court also ruled that a party to the conversation had the right to record the conversation and had not violated federal wiretap laws.

Constitutional Issues. A number of cases dealing with constitutional questions occurred this year. Separation of church and state was before the court in several ways. In Minnesota, taxpayers unsuccessfully raised a claim that the payment of tuition money for high school seniors enrolling in college level courses at a religiously affiliated, but not religiously pervasive, college by a school district violated state religious separation clauses.[85] In a related case, federal taxpayers, on appeal, successfully claimed that the funding of religious-affiliated schools abroad by the Agency for International Development and the Office of American Schools and Hospitals Abroad was not a nonjusticiable political question but rather a possible violation of the establishment clause.[86] The case was remanded for further litigation.

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[76] University of Miami v. Echarte, 585 So. 2d 293 (Fla. Dist. Ct. App. 1991).

[77] Moore v. Louisiana Univ. Medical Center, 596 So. 2d 293 (La. Ct. App. 1992).

[78] Bourke v. Albany Medical Center, 575 N.Y.S.2d 183 (App. Div. 1991).

[79] United States v. Walters, 775 F. Supp. 1173 (N.D. Ill. 1991).

[80] United States v. Jakeway, 783 F. Supp. 590 (M.D. Fla. 1992).

[81] Burk v. Beene, 948 F.2d 489 (8th Cir. 1991).

[82] Parkin v. Cornell Univ. Inc., 581 N.Y.S.2d 914 (App. Div. 1992).

[83] Martin v. Thomas, 973 F.2d 449 (5th Cir. 1992).

[84] Thomas v. Pearl, 793 F. Supp. 838 (C.D. Ill. 1992).

The final case in this section raised the question of whether the Virginia Military Academy (VMI) operated as a single-sex military academy by the state of Virginia in violation of the equal protection clause of the Fourteenth Amendment. On appeal from the lower court,[87] the Fourth Circuit Court of Appeals remanded the case to determine if the state, under the provisions of ***Mississippi University for Women v. Hogan***,[88] could adequately articulate educationally sound reasons for the maintenance of a single-gender program.[89]

Discrimination in Employment

Title VI

The elimination of dual systems of higher education in several states continued as a compliance issue under title VI. The Mississippi case where the federal district court found that the state had developed racially neutral policies and eliminated duplication consistent with the requirements of title VI,[90] was heard on appeal. The Fifth Circuit Court of Appeals reversed and remanded this decision, finding that the state had not done enough to eliminate the dual system.[91] However, in an *en banc* hearing, the court affirmed the district court position.[92] The Supreme Court, in *United States v. Fordice*,[93] reversed, reasoning that the state needed to become proactive at dismantling the dual system of higher education.[94] The Court warned that if racially neutral policies were traceable to prior *de jure* discrimination and had the current effect of fostering segregation, these policies would meet constitutional and title VI scrutiny only if based on sound educational policy.[95] With the caveat that the Supreme Court's list was not inclusive, the district court was free to apply its analysis to other polices of that court's choosing, the Supreme Court remanded the case for an appropriate review of four specific policies:[96] the differential admissions criteria among the predominantly white and historically black institutions;[97] the widespread duplication of programs among the state institutions;[98] the state's scheme of institutional mission classification;[99] and the continued operation of all eight institutions of higher education.[100] The court, citing the state duty to guarantee students free choice of the range of programs offered, stated that:

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[85] Minnesota Fed'n of Teachers v. Mammenga, 485 N.W.2d 305 (Minn. Ct. App. 1992).

[86] Lamont v. Woods, 948 F.2d 825 (2d Cir. 1991).

[87] *See* THE YEARBOOK OF EDUCATION LAW 1992 at 195, United States v. Commonwealth of Va., 766 F. Supp. 1407 (W.D. Va. 1991).

[88] *See* THE YEARBOOK OF SCHOOL LAW 1983 at 311, Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).

[89] United States v. Virginia, 976 F.2d 890 (4th Cir. 1992).

[90] *See* THE YEARBOOK OF EDUCATION LAW 1989 at 205, Ayers v. Allain, 674 F. Supp. 1523 (N.D. Miss. 1987).

[91] *See* THE YEARBOOK OF EDUCATION LAW 1991 at 198, Ayers v. Allain, 828 F.2d 1532 (5th Cir. 1990).

[92] *See* THE YEARBOOK OF EDUCATION LAW 1992 at 177, 178, Ayers v. Allain, 914 F.2d 676 (5th Cir. 1990).

[93] 112 S. Ct. 2727 (1992).

[94] *Id.* at 2735.

> The full range of policies and practices must be examined with this duty in mind. That an Institution is predominantly white or black does not itself make out a constitutional violation. But surely the state may not leave in place policies rooted in its prior officially-segregated system that serve to maintain the racial identifiability of its universities if those policies can practically be eliminated without eroding sound educational policies.[101]

The Alabama case decided this year involved previously monitored court enforcement of the dismantling of the state's dual system of higher education.[102] In an extensive decision, the court chronicled the education policies of the state of Alabama throughout its history which gave rise to and perpetuated the dual system of higher education.[103] The court found that vestiges of the dual system remained in policies and practices in the following areas: faculty and administrative employment, state funding of facilities at historically black institutions, admissions policies, and program duplication. The court issued an extensive list of court decrees dealing with remedying these policies and practices at all the historically black and predominantly white institutions in the state.

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[95] *Id.* at 2737.
[96] *Id.* at 2738.
[97] *Id.* at 2738.
[98] *Id.* at 2740.
[99] *Id.* at 2741.
[100] *Id.* at 2742.
[101] *Id.* at 2743.
[102] *See* THE YEARBOOK OF SCHOOL LAW 1986 at 192, United States v. Alabama, 628 F. Supp. 1137 (N.D. Ala. 1985).
[103] Knight v. Alabama, 787 F. Supp. 1030 (N.D. Ala. 1991).

Title VII

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, gender, and national origin. Issues litigated this year under title VII include questions of procedures, the shifting burden of proof, class action suits, retaliation for filing a complaint, and damages.

Tolling, or the time limitation to file a complaint, was at issue in an Oklahoma case. An applicant for a college position filed suit alleging hiring discrimination against a college and the Equal Employment Opportunities Commission (EEOC) for incomplete investigation of the claim. The Tenth Circuit Court of Appeals affirmed the district court ruling that the plaintiff's claim was time barred because she failed to meet the EEOC filing deadline set forth in the right to sue letter.[104]

One procedural case involved the Air Force Institute of Technology where a female attorney alleged she was denied employment as a professor because of her gender.[105] The court denied a summary judgment to the institution finding that interview questions directed to the prospective employee were evidence of a *per se* title VII violation and material issues existed requiring litigation. In Michigan, a federal court awarded a summary judgment to a university in a case involving a full professor who was not reappointed as a grievance officer under the institution's grievance system.[106] The court ruled that the plaintiff failed to establish that she suffered adversely from the action, that she was qualified for the position, and that the institution's reasons were a pretext for discrimination. In Utah, a federal court dismissed a pendent state law claim to a title VII suit where the plaintiff failed to comply with notice provisions under the state law.[107] A Pennsylvania plaintiff, after successfully negotiating an out-of-court settlement except for a release from further prosecution, sued to get the court to enforce the limited release from prosecution after signing the institution's general release.[108] The court refused to enforce the plaintiff's version of the settlement agreement. While a community college faculty member filed a claim of sex discrimination in 1984, she subsequently alleged both retaliation for the 1984 claim and discrimination when she failed to receive a promotion.[109] The court ruled that failure to file with EEOC on the present claims precluded action in federal court. Furthermore, damages for intentional discrimination were not available under title IX.

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[104] Scheerer v. Rose State College, 774 F. Supp. 620 (W.D. Okla. 1991), *aff'd*, Scheerer v. Rose State College, 950 F.2d 661 (10th Cir. 1991).

[105] Stukey v. United States Air Force, 790 F. Supp. 165 (S.D. Ohio 1992).

[106] Brady v. DiBiaggio, 794 F. Supp. 663 (W.D. Mich. 1992).

[107] Kabwasa v. University of Utah, 785 F. Supp. 1445 (D. Utah 1990).

[108] Bontigao v. Villanova Univ., 786 F. Supp. 513 (E.D. Pa. 1992).

[109] Preston v. Commonwealth of Va., 779 F. Supp. 45 (W.D. Va. 1990).

The shifting burden of proof in title VII cases requires that the plaintiff establish a *prima facie* case of discrimination, that the defendant establish legitimate reasons for the personnel action, and the plaintiff prove that the offered reasons are a pretext for discrimination. A District of Columbia faculty member, denied promotion to full professor, charged discrimination based on race under title VII.[110] The plaintiff met his burden of establishing a *prima facie* case of discrimination. The institution provided reasons for its decision not to promote. These reasons included a process which counted the number of activities in each area but did not include an evaluation of the quality of the activities. The court found that this quantitative process plus statements made by the dean of the college favoring black female candidates were a pretext to discriminate against the plaintiff.[111] Damages in the form of back pay and deposits into the professor's retirement system were awarded.

A faculty member who was part of a class action claim against a city university was barred under the doctrine of *res judicata* from raising salary-related claims in this case.[112] While nonsalary claims did not come under *res judicata*, they were barred because no claim for them had been filed with EEOC.

In a case involving sexual harassment, the court refused to grant summary judgment.[113] The court found that an alleged slap on the buttocks could constitute sexual harassment. Additionally, the court ruled that nonrenewal of a one-year contract did not entitle the plaintiff to due process, but material issues existed as to whether the nonrenewal was retaliation for her sexual harassment claim. A Pennsylvania sexual harassment case was back in the courts.[114] In the third decision on this matter, the federal district court ruled that the plaintiff had established a *prima facie* case of discrimination, that the private college established legitimate employment reasons for the nonrenewal (documented poor quality work) and denial of tenure decision, and that the statute of limitations ran out on the sexual harassment claim, based on a single incident, as opposed to being a continuing violation.[115]

A Michigan university police officer successfully presented a sex discrimination claim on her dismissal as an officer.[116] However, damage awards were diminished by the court because she had falsified records on her application. On appeal, the Sixth Circuit Court of Appeals reversed the decision finding that falsification of application materials would result in the immediate dismissal of the employee.[117] An assistant professor who successfully brought a sex discrimination claim against a Wisconsin university, was awarded attorney fees, not only on her federal claim, but also on her state claim and action before the personnel commission and the institution's faculty rights committee.[118]

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[110] Bachman v. Board of Trusfees of the Univ. of D.C., 777 F. Supp. 990 (D.D.C. 1991).

[111] *Id.* at 996.

[112] Moche v. City Univ. of N.Y., 781 F. Supp. 160 (E.D.N.Y. 1992).

[113] Campbell v. Board of Regents of the State of Kan., 770 F. Supp. 1479 (D. Kan. 1991).

[114] *See* THE YEARBOOK OF EDUCATION LAW 1992 at 178, 179, Garvey v. Dickinson College, 763 F. Supp. 799 (M.D. Pa. 1991); 761 F. Supp. 1175 (M.D. Pa. 1991).

[115] Garvey v. Dickinson College, 775 F. Supp. 788 (M.D. Pa. 1991).

[116] *See* THE YEARBOOK OF EDUCATION LAW 1992 at 180, Milligan-Jensen v. Michigan Tech. Univ., 767 F. Supp. 1403 (W.D. Mich. 1991).

The Equal Pay Act

A number of cases involved alleged violations of the Equal Pay Act. A Tennessee equal pay claim was brought by several female division chairs after a new male chair was brought in at a salary higher than theirs.[119] The court ruled that the institution failed to establish reasonable grounds for the pay differential and awarded damages equal to back pay through the beginning of the new chair's employment. A Tennessee female extension agent was not promoted when her male counterpart was. She filed a claim and began to receive negative work evaluations.[120] The court found that the shifting burden of proof strategy was not fulfilled when the university failed to provide nondiscriminatory reasons free of pretext. Negative evaluations of the female agent's work were given more weight than those of her male counterpart.

A case in the courts for several years involved the allegations that female education faculty were given higher salaries than male faculty in violation of the Equal Pay Act.[121] The federal circuit court found that the proper analysis by the district court using the shifting burden of proof found the plaintiffs unable to show that the legitimate reasons for the pay disparity were a pretext for discrimination.[122]

Age Discrimination in Employment

The lead off case on age discrimination in employment involved a tenured faculty member, who was about to lose his position with an institution, accepted a position at another institution, but continued negotiations for an early retirement program with his present institution. A federal circuit court affirmed a lower court ruling that negotiation of an early retirement agreement, after accepting a position at another institution, was fraud and negated any claim under the Employment Retirement Income Securities Act.[123] In a subsequent decision, the court ruled that the claim brought by the professor was frivolous, warranting the award of attorney fees to the university.[124] A business manager at a Pennsylvania university brought action claiming that his dismissal for perceived shortcomings in his work was discrimination on the basis of age.[125] Summary judgment was granted to the institution on the grounds that he had failed to show the existence of material issues. On a request for rehearing on the matter, the same court found that he had failed to show that the reasons for dismissal were a pretext for discrimination.[126] A case previously cited in other years[127] involved an insurance company's coverage for damages in litigation over an institution's violation of the Age Discrimination in Employment Act (ADEA). The court ruled that the insurance company failed in its duty to establish that the institution's violation of the ADEA was intentional.[128]

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[117] Milligan-Jensen v. Michigan Tech. Univ., 975 F.2d 302 (6th Cir. 1992).

[118] Duello v. Board of Regents of Univ. of Wis. Sys., 487 N.W.2d 56 (Wis. Ct. App. 1992).

[119] Hatton v. Hunt, 780 F. Supp. 1157 (W.D. Tenn. 1991).

[120] Roberson v. University of Tenn., 829 S.W.2d 149 (Tenn. Ct. App. 1992).

[121] *See* THE YEARBOOK OF EDUCATION LAW 1988 at 233, Schwartz v. Florida Bd. of Regents, 807 F.2d 901 (11th Cir. 1987).

[122] Schwartz v. Florida Bd. of Regents, 954 F.2d 620 (11th Cir. 1991).

Early retirement plans sometimes provide that if an employee refuses to accept retirement up to age 65, after age 65 the institution will discontinue any payments into the employee's retirement plan. In a case before the courts on several occasions, the Seventh Circuit ruled that discontinuation of payments by an employer into a retirement program after age 65 did not violate ADEA.[129] In another case, a federal appeals court reversed a lower court decision.[130] The court ruled that a collective bargaining agreement, which had a provision that any grievance procedure would halt once an employer brought an age discrimination claim in court, violated the ADEA.

The "opt-in" provisions of a class action claim were before a federal court on appeal.[131] The federal appellate court ruled that the district court was correct in denying an administrator the option of joining another employee's age discrimination in termination suit because, at the time the employee filed the claim, the administrator had not been terminated.

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[123] Nash v. Trustees of Boston Univ., 776 F. Supp. 73 (D.R.I. 1990), *aff'd*, 946 F.2d 960 (1st Cir. 1991).

[124] Nash v. Trustees of Boston Univ., 790 F. Supp. 48 (D.R.I. 1991).

[125] Dodge v. Susquehanna Univ., 785 F. Supp. 502 (M.D. Pa. 1992).

[126] Dodge v. Susquehanna Univ., 796 F. Supp. 829 (M.D. Pa. 1992).

[127] *See* The Yearbook of Education Law 1991 at 200, Andover Newton Theological Sch. v. Continental Casualty Co., 901 F.2d 1 (1st Cir. 1990); *see* The Yearbook of Education Law 1992 at 181, Andover Newton Theological Sch. v. Continental Casualty Co., 930 F.2d 89 (1st Cir. 1991).

[128] Andover Newton Theological Sch. v. Continental Casualty Co., 964 F.2d 1237 (1st Cir. 1992).

[129] Bell v. Purdue Univ., 975 F.2d 422 (7th Cir. 1992); *see* The Yearbook of Education Law 1988 at 234, Bell v. Purdue Univ., 658 F. Supp. 184 (N.D. Ind. 1987); *see also* The Yearbook of Education Law 1992 at 181, Bell v. Purdue Univ., 761 F. Supp. 1360 (N.D. Ind. 1991).

[130] EEOC v. Board of Governors of State Colleges and Univ., 957 F.2d 424 (7th Cir. 1992); *see* The Yearbook of Education Law 1991 at 200, EEOC v. Board of Governors of State Colleges and Univ., 735 F. Supp. 888 (N.D. Ill. 1990).

[131] Anson v. University of Tex. Health Science Ctr., 962 F.2d 539 (5th Cir. 1992).

Several cases raised constitutional challenges to legally existing mandatory retirement provisions that do not expire under ADEA until 1994. Cases brought in Oklahoma[132] and New Jersey[133] under the equal protection clause and the due process clauses of the Fourteenth Amendment were unsuccessful in developing cogent arguments to challenge the continued existence of these provisions until their expiration next year. Finally, by filing a complaint with a state agency within 300 days of the discriminatory event, a Texas plaintiff met the tolling requirements for both a state and a federal ADEA claim.[134]

The Rehabilitation Act

An employee of an Ohio university suffered from attacks due to fumes and materials in the air of the work place. Her absence from work because of these attacks eventually resulted in her termination. The state's civil rights commission found that the institution had discriminated against her because of her handicap. A state court overturned the commission's findings, and the state appeals court reversed, upholding the ruling.[135] The court found that the institution failed to make the necessary accommodations in light of the employee's handicap. One case involved a fire fighter with a reading handicap who applied for a position at the West Point Military Academy. The court found that in light of the ordnance and other chemicals stored on the academy grounds, the ability to read and learn procedures in a fire manual was essential to the position.[136] Job accommodations suggested by the applicant would compromise the safety of all involved. Finally, a plaintiff, blind since birth, was denied necessary services by the state Social Service Agency in order to attend college. A New York court ruled that the state was obligated under the Rehabilitation Act to assist her in reaching the highest possible achievable goal, not just to provide training for suitable employment reasonably matched to her ability.[137]

Hiring Discrimination

A black man who applied for fourteen different positions over a two-month period, filed suit alleging race discrimination seven years after receiving a right to sue letter.[138] The federal court ruled that the suit was time barred. In another case involving the same institution, the court ruled that student groups lacked standing to bring complaints of discrimination in the institution's hiring practices.[139]

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[132] Crozier v. Howard, 772 F. Supp. 1192 (W.D. Okla. 1991).

[133] Freund v. Florio, 795 F. Supp. 702 (D.N.J. 1992).

[134] Cook v. Lee College, 798 F. Supp. 417 (S.D. Texas 1992).

[135] Kent State Univ. v. Ohio Civil Rights Comm'n, 581 N.E.2d 1135 (Ohio Ct. App. 1989).

[136] DiPompo v. West Point Military Academy, 770 F. Supp. 887 (S.D.N.Y. 1991).

[137] *In re* Polkabla, 583 N.Y.S.2d 464 (App. Div. 1992).

A Wisconsin law student who graduated in the top 5% of his class argued that the law school refused to hire him because he was a white male.[140] The court upheld the denial of his request for a preliminary injunction prohibiting the law school from hiring, promoting, or spending money under two programs designed to assist minority teachers and scholars. In Maryland, an African American with a facial skin condition that prohibited shaving, filed suit challenging a university police dress code prohibiting beards.[141] The court ruled that the adverse affect the policy had on African American males outweighed the business necessity of creating a proper image for the police force.

Faculty Employment

First Amendment Speech

Summary judgment was denied on a plaintiff's First Amendment and due process claims surrounding his termination.[142] A professor of geology publicly objected to a coal power plant located close to an area of high seismic fault activity. He claimed the school and the power company retaliated against him by terminating him as a faculty member at the institution. The court found that issues existed which required litigation.

Several Indiana faculty members alleged that a letter written to the institution's provost, complaining about the fairness of the peer review committee and requesting an external review, was the basis for their denial of tenure in violation of First Amendment rights.[143] A federal district court granted summary judgment to the institution.[144] A federal circuit court of appeals affirmed the lower court finding that the letter about the peer review committee and the faculty feud within the sociology department were employee concerns, not matters of public concern. The court further confirmed that the plaintiffs had no property right in the decision to award tenure or reappointment.

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[138] Johnson v. Rodriguez, 943 F.2d 104 (1st Cir. 1991).

[139] Harvard Law Sch. Coalition v. President and Fellows of Harvard College, 595 N.E.2d 316 (Mass. 1992).

[140] Reise v. Board of Regents of Univ. of Wis. Sys., 957 F.2d 293 (7th Cir. 1992).

[141] University of Md. v. Boyd, 612 A.2d 305 (Md. Ct. Spec. App. 1992).

[142] McCann v. Ruiz, 788 F. Supp. 109 (D.P.R. 1992).

[143] Colburn v. Trustees of Ind. Univ., 973 F.2d 581 (7th Cir. 1992).

[144] *See* THE YEARBOOK OF EDUCATION LAW 1991 at 204, Colburn v. Trustees of Ind. Univ., 739 F. Supp. 1268 (S.D. Ind. 1990).

The Nonrenewal Decision. The lead case involved litigation which began in 1970 and continues to this day. The case involved a faculty member whose contract was not renewed after he refused to teach the classes assigned to him by the academic vice president. The courts eventually ruled in favor of the institution.[145] This case involved state litigation that commenced in 1970 to ban the plaintiff from the use of the campus, which the plaintiff now used to claim the right to reinstatement and his job.[146] Under the doctrine of *res judicata*, a finding in federal court barred this claim in state court. This may be the last litigation on this matter.

A faculty member whose one-year contract was not renewed after the third year, unsuccessfully alleged that the dean of the college was not qualified for her position and, therefore, her decision was void.[147] The faculty member's negligent supervision claim also failed. In a Florida case, a nonrenewal letter contained disputed allegations that could have had a stigmatizing effect on the faculty member and warranted a hearing on the matter. Accordingly, the court directed the university to provide the appropriate hearing.[148]

Breach of contract claims were present in a number of cases. A Florida court found that a faculty member should be continued under a contact as long as his instructional skills were sound.[149] The five-year appointment was not contingent on his continued progress toward a doctoral degree. A faculty member unsuccessfully claimed that the institution had breached its contract by failing to notify her as prescribed in the collective bargaining agreement.[150] The court found that through the previous settlement agreement, the institution had notified her of the pending termination. In a Florida breach of contract claim, the court refused to issue a summary judgment to the institution.[151] The Eleventh Circuit ruled that changes in the statute of limitations law (downward from six years) would not apply to this case or to others retroactively.[152] An Iowa faculty member claimed that the institution had breached his contract when it failed to reappoint him to another one-year contract, thus failing to give him tenure.[153] The court dismissed his claim, finding that there was available agency action within the state to address the claims brought. A contract with a termination clause for poor performance was not breached when a faculty member was reassigned, but refused to accept reappointment to another campus, where more supervision could be provided.[154]

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[145] Skehan v. Board of Trustees of Bloomsburg State College, 353 F. Supp. 542 (M.D. Pa. 1973); 358 F. Supp. 430 (M.D. Pa. 1973), *vacated and remanded*, 501 F.2d 31 (3d Cir. 1974), *vacated*, 421 U.S. 983 (1975), *remanded en banc*, 538 F.2d 53 (3d Cir. 1976), *cert. denied*, 429 U.S. 979 (1976), *on remand*, 431 F. Supp. 1379 (M.D. Pa. 1977), *aff'd in part, rev'd in part*, 590 F.2d 470 (3d Cir. 1978), *cert. denied*, 444 U.S. 832 (1979), *on remand*, 501 F. Supp. 1360 (M.D. Pa. 1980), later proceedings, 669 F.2d 142 (3d Cir. 1982), *cert. denied*, 459 U.S. 1048 (1982); *see* THE YEARBOOK OF SCHOOL LAW 1983 at 304, 669 F.2d 142 (3d Cir. 1982).

[146] Commonwealth *ex rel.* Bloomsburg State College v. Skehan, 610 A.2d 516 (Pa. Commw. Ct. 1992); *see also* THE YEARBOOK OF SCHOOL LAW 1987 at 250, Skehan v. Bloomsburg State College, 503 A.2d 1000 (Pa. Commw. Ct. 1986).

[147] Guild v. Saint Martin's College, 827 P.2d 286 (Wash. Ct. App. 1992).

[148] Yunker v. University of Fla., 602 So. 2d 557 (Fla. Dist. Ct. App. 1992).

[149] Bryant v. State of Fla. Bd. of Regents, 596 So. 2d 1233 (Fla. Dist. Ct. App. 1992).

[150] Daniel v. Long Island Univ., 585 N.Y.S.2d 349 (App. Div. 1992).

[151] Kasweck v. Florida Inst. of Tech., 590 So. 2d 1100 (Fla. Dist. Ct. App. 1991).

Constitutional questions also came before the courts in cases involving the nonrenewal of probationary faculty. For example, a private Catholic university appealed a breach of contract claim brought by two nuns whose contracts were not renewed.[155] The court, on appeal, ruled that the matters under question did not involve doctrinal issues or issues of church polity, nor did the contact incorporate cannon law, prohibited from adjudication by First Amendment provisions.[156] However, in a case involving a faculty member at a theological seminary, the court found that where duties involved ministerial functions, the court, on First Amendment grounds, could not interfere with the employment contract.[157]

Denial of Tenure. Several cases involved tenure review and a decision to deny tenure. On appeal, a federal court affirmed a lower court decision that the faculty member lacked a reasonable expectation of continuous employment and had no property right in a tenure award.[158] The university's decision to deny tenure was not an arbitrary and capricious decision. In Oregon, the court reached a similar result, finding that the plaintiff possessed no property right in a tenure award.[159] An Illinois court ruled that the statute of limitations of 180 days had tolled from the date the faculty member was issued a terminal contract after denial of tenure, and the filing was time barred.[160]

In a case involving a black faculty member who was denied tenure by a private California university, the court found the whole process to be tainted with discrimination.[161] The faculty member had completed all the projects for which he was told tenure would be awarded. The court found that part of the taint of discrimination was in the manner in which the education department faculty treated the plaintiff and discussions held at various times.

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[152] Lufkin v. McCallum, 956 F.2d 1104 (11th Cir. 1992); *see* THE YEARBOOK OF EDUCATION LAW 1992 at 186, Lufkin v. McCallum, 752 F. Supp. 421 (N.D. Ala. 1990).

[153] Genetzky v. Iowa State Univ., 480 N.W.2d 858 (Iowa 1992).

[154] Hughes v. Idaho State Univ., 835 P.2d 670 (Idaho Ct. App. 1992).

[155] *See* THE YEARBOOK OF EDUCATION LAW 1992 at 184, Welter v. Seton Hall Univ., 579 A.2d 332 (N.J. Super. Ct. App. 1990).

[156] Welter v. Seton Hall Univ., 608 A.2d 206 (N.J. 1992).

[157] Alicea v. New Brunswick Theological Seminary, 608 A.2d 218 (N.J. 1992).

[158] Spuler v. Pickar, 958 F.2d 103 (5th Cir. 1992).

[159] Logsdon v. Ohio Northern Univ., 587 N.E.2d 942 (Ohio Ct. App. 1990).

[160] Faulkner-King v. Department of Human Rights, 587 N.E.2d 599 (Ill. App. Ct. 1992).

A white faculty member at an historically black law school charged discrimination in his nonappointment to a tenure track position. The district court granted j.n.o.v. in favor of the institution and, on appeal, the Fifth Circuit Court of Appeals reversed.[162] While the district court granted the institution's motion for a new trial, the appellate court found it lacked jurisdiction.[163]

A faculty member who was denied tenure brought claims before the courts on several occasions.[164] The First Circuit Court of Appeals affirmed the lower court decision finding that the faculty member had failed to establish a *prima facie* case of sex discrimination in the denial of tenure.[165]

Two cases rejected the retroactive application of the Civil Rights Act of 1991 to cases involving discrimination which predated that Act.[166] In one case, the plaintiffs attempted to capitalize on the compensatory and punitive damage award provisions under the new Act.[167] In another case involving a faculty member's out of court settlement of gender discrimination in a denial of tenure claim, the court found that it was an abuse of discretion for the judge to reduce the plaintiff's attorney fees, and that the fee-on-fee award reduction constituted a double reduction.[168]

Part-time Faculty

A part-time junior college faculty member became embroiled in a controversy over grades he had given during the spring semester. College officials asked him during the summer months to respond to requests for information about his course and the grades. The plaintiff sought extra compensation for these inquires and claimed that the school had an implied contractual obligation to pay him extra compensation and to employ him to teach courses during the summer term. The Illinois court found no implied contract rights or a breach of contract in this case.[169]

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[161] Clark v. Claremont Univ. Center and Graduate Sch., 8 Cal. Rptr.2d 151 (Ct. App. 1992).

[162] *See* THE YEARBOOK OF EDUCATION LAW 1991 at 204, Arenson v. Southern Univ. Law Center, 911 F.2d 1124 (5th Cir. 1990).

[163] Arenson v. Southern Univ. Law Center, 963 F.2d 88 (5th Cir. 1992).

[164] *See* THE YEARBOOK OF EDUCATION LAW 1988 at 238, Fields v. Clark Univ., 817 F.2d 931 (1st Cir. 1987).

[165] Fields v. Clark Univ., 966 F.2d 49 (1st Cir. 1992).

[166] Mazen v. Board of Regents of Regency Univ. of the State of Ill., 789 F. Supp. 954 (C.D. Ill. 1992); Crumley v. Delaware State College, 797 F. Supp. 341 (D. Del. 1992).

[167] Crumley, 797 F. Supp. at 341.

[168] Nanetti v. University of Ill. at Chicago, 944 F.2d 1416 (7th Cir. 1991).

Tenured Faculty

Termination for Cause. Termination of tenured faculty for cause is an area where litigation continues to be active. The lead off case involved a faculty member at the City University of New York whose editorial comments in a local newspaper were viewed by some as racist.[170] As a result, a group began to disrupt his classes, and the institution commenced an investigation of the professor and set up "shadow sections" of his courses, taught by others, for students who found him offensive. The plaintiff alleged that such actions abridged his free speech and threatened his tenure rights. The federal district court found that the actions of the University in failing to take measures against those who disrupted his classes, establishing shadow sections of his classes, and investigating his writings was an attempt by the institution to silence his views, which is constitutionally impermissible. The court issued an injunction ordering the institution to cease its investigation and the practice of having parallel sections of the professor's classes. On appeal, the Second Circuit affirmed that the actions of the institution had a chilling effect on the professor's First Amendment rights, but that the plaintiff was entitled to declaratory, not injunctive, relief.[171]

Several cases raised questions surrounding the procedures followed in the termination of tenured professors. In one case involving malpractice charges against a university hospital faculty physician, the court ruled that it was improper for the lower court to have ordered the medical review committee records sealed from public view.[172] In a Kansas case, a community college faculty member was dismissed for failing to check out equipment from the college. The court issued a summary judgment to the institution, finding that while some procedural errors constituted deprivation, it was remedied through the state's judicial review mechanism in tenure removal cases.[173]

An institution terminated a faculty member after finding that he was abusive to Chinese students and required them to perform personal services at his home without pay.[174] The district court found that the grounds set forth by the university were overly vague and, therefore, could not be used to dismiss the tenured faculty member. On appeal, the federal appellate court reversed and remanded the case.[175] The court found that a policy, which defined cause as failure to maintain a standard of sound scholarship and gross negligence of established institutional policies, was no more vague than regulations concerning moral turpitude, which have repeatedly been upheld against vagueness charges.[176]

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[169] Zadrozny v. City Colleges of Chicago, 581 N.E.2d 44 (Ill. App. Ct. 1991).

[170] Levin v. Harleston, 770 F. Supp. 895 (S.D.N.Y. 1991); *see* THE YEARBOOK OF EDUCATION LAW 1992 at 183, Levin v. Harleston, 752 F. Supp. 620 (S.D.N.Y. 1990).

[171] Levin v. Harleston, 966 F.2d 85 (2d Cir. 1992).

[172] Stone v. University of Md. Medical Sys. Corp., 948 F.2d 128 (4th Cir. 1991); *see* THE YEARBOOK OF EDUCATION LAW 1989 at 217, Stone v. University of Md. Medical Sys. Corp., 855 F.2d 167 (4th Cir. 1988), 855 F.2d 178 (4th Cir. 1988).

[173] Hartwick v. Board of Trustees of Johnson County Community College, 782 F. Supp. 1507 (D. Kan. 1992).

Finally, in a termination for cause case which resulted in the punishment of plaintiff's attorney for calling 200 witnesses as part of the pretrial statement, the court levied appropriate fines.[177] While fining plaintiff's attorney for her actions, the court refused to grant attorney fees to the institution's counsel, since his actions during the trial were of a harassing nature and affected the plaintiff's attorney's ability to present her case.

Termination for Financial Exigencies. Terminations for financial exigencies were in the courts during the past year. In a District of Columbia case, the court ruled that appeals under the Comprehensive Merit Personnel Act were not available to faculty terminated as part of a reduction-in-force.[178] In another case, a federal appellate court reversed a summary judgment finding that material issues existed as to whether each terminated tenured faculty member was afforded due process, but concluded that hearing and notice opportunities, with respect to program elimination, met due process requirements for program elimination.[179]

Denial of Employee Privileges. Faculty privileges were also contested this year. For example, a professor claimed that he was discriminated against in the award of salary when his salary was well below that of other full professors. A Vermont court found that the faculty member had the right to discovery of information concerning colleagues' salaries as part of the grievance procedures.[180] In a Minnesota case, the court found that the removal of a department chair was not a breach of contract nor was it improper for the grievance procedures to exclude claims for department chair removal in the collective bargaining agreement.[181]

Several cases involved questions of promotion to the rank of professor. One faculty member sought access to records of the university promotion committee's deliberations alleging under state law that his denial of promotion was a violation of state anti-discrimination laws.[182] A Florida court ruled that confidential employee evaluation files were excluded from the public records inspection law. A Wisconsin professor was demoted to an associate professor after he refused to a write a student a letter of apology and change her grade.[183] A university faculty disciplinary committee found that the faculty member was abusive and unprofessional in his relationship with the student, and ordered him to write a letter of apology and change a grade or receive sanctions. A federal appellate court ruled that his letters to the student were not protected speech under the First Amendment since they were not matters of public concern, and that his conduct warranted appropriate sanctions. Another federal circuit court found that the failure to appoint a white professor as a distinguished professor was not discrimination when the instructions for the search requested that the list of potential appointees include significant representation of women and minorities.[184] Finally, the Seventh Circuit Court of Appeals dismissed and vacated a finding reached before there was an administrative complaint of scientific misconduct brought against a university researcher.[185]

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[174] *See* THE YEARBOOK OF SCHOOL LAW 1991 at 206, San Filippo v. Bongiovanni, 743 F. Supp. 327 (D.N.J. 1990).

[175] San Filippo v. Bongiovanni, 961 F.2d 1125 (3d Cir. 1992).

[176] *Id.* at 1127.

[177] Derechin v. State Univ. of N.Y., 138 F.R.D. 362 (W.D.N.Y. 1991).

[178] Davis v. University of D.C., 603 A.2d 849 (D.C. 1992).

[179] Texas Faculty Ass'n v. University of Tex. at Dallas, 946 F.2d 379 (5th Cir. 1991).

[180] *In re* Gobin, 610 A.2d 150 (Vt. 1992).

[181] White v. Winona State Univ., 474 N.W.2d 410 (Minn. Ct. App. 1991).

Administrators and Staff

Collective Bargaining

Collective bargaining litigation was again extensive. Litigation ranged from jurisdiction of the state labor relations board, decertification of the bargaining unit, membership in the collective bargaining unit, obligations of nonmember employees of the union shop, unfair labor practices, grievance procedures, and the content of the union contract.

In a jurisdictional question, a Pennsylvania court found that the university and the private contractor were joint employers, but because the university was the primary determiner of disciplinary action, an ordered remedy could be directed solely to the university.[186] A state board of higher education's change in job classifications and reclassification appeals procedure was found to be a nonnegotiable issue, except where the new regulations dealt with procedures.[187] In Ohio, the state's Labor Relations Board dismissed a university employee's petition for decertification of the union as the bargaining agent. A state appellate court ruled that a public institution lacked standing to appeal a state Labor Relations Board decision.[188]

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[182] Cantanese v. Ceros—Livingston, 599 So. 2d 1021 (Fla. Dist. Ct. App. 1992).

[183] Keen v. Penson, 970 F.2d 252 (7th Cir. 1992).

[184] Silver v. City Univ. of N.Y., 947 F.2d 1021 (2d Cir. 1991).

[185] Abbs v. Sullivan, 963 F.2d 918 (7th Cir. 1992).

[186] United Ass'n of Journeymen, Steamfitters Local 449 v. Pennsylvania Labor Relations Bd., 613 A.2d 155 (Pa. Commw. Ct. 1992).

[187] Council of N.J. State College Locals v. State, 598 A.2d 1237 (N.J. Super. Ct. App. Div. 1991).

Litigation involving the issue of the right to organize as a collective bargaining unit was before the court in several forms. Eligibility of certain individuals to vote was at issue after the successful election of the union as the bargaining agent for professional employees at an Ohio college. The court ruled that the state Labor Relation Board failed to adequately investigate challenged ballots and to offer the college an oral hearing on the challenged voting employees.[189] An Ohio university hospital questioned the designation of medical residents as employees eligible to bargain collectively.[190] The court found that the medical residents were employees eligible to organize and bargain collectively.

Membership in the collective bargaining unit was before the courts. For example, a New York court ruled that the administrators of the state's regency college degree program were civil servants and public employees.[191] Another New York court ruled that graduate and teaching assistants were employees eligible to organize and bargain collectively.[192] However, a California court reached the opposite decision finding organizing and bargaining of graduate student instructors and teachers was outside the purpose of the Collective Bargaining Act.[193] An Illinois court ruled that building services supervisors in charge of assigning and directing the work of employees were not eligible under the Labor Relations Act to participate as members of the collective bargaining unit.[194] In a Kansas case, the court reached a similar result with university police department supervisors.[195]

The nature of what is negotiable or what are management prerogatives was before the courts in a case involving the promotion and tenure award procedures at a New Jersey university.[196] The court found that while the proposals submitted by the faculty union were labelled as procedural, their effect was substantive and interfered with the decision making on promotion and tenure awards, clearly a management prerogative. The court affirmed as negotiable those parts of the proposal that dealt with notification at all levels and concluded that they were clearly procedural, not substantive, issues.

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[188] Miami Univ. v. State Employment Relations Bd., 591 N.E.2d 415 (Ohio Ct. App. 1990).

[189] Hocking Tech. College v. State Employment Relations Bd., 590 N.E.2d 370 (Ohio Ct. App. 1990).

[190] University Hosp. v. State Employment Relations Bd., 587 N.E.2d 835 (Ohio 1992).

[191] University of N.Y. v. Newman, 585 N.Y.S.2d 235 (App. Div. 1992).

[192] State v. New York State Pub. Employment Relations Bd., 586 N.Y.S.2d 662 (App. Div. 1992).

[193] Association of Graduate Student Employees v. Public Employment Relations Bd., 8 Cal. Rptr.2d 275 (Ct. App. 1992).

[194] Board of Trustees of Univ. of Ill. v. Illinois Educ. Labor Relations Bd., 600 N.E.2d 1292 (Ill. App. Ct. 1992).

[195] Kansas Univ. Police Officers Ass'n v. Public Employee Relations Bd., 828 P.2d 369 (Kan. Ct. App. 1991).

[196] Rutgers v. Rutgers Council of AAUP Chapters, 606 A.2d 822 (N.J. Super. Ct. App. Div. 1992).

Nonunion employees challenged the collection by the university of agency shop fees for the union.[197] A federal circuit court affirmed the district court finding that failure of nonunion members to respond to a constitutionally correct notice of fee assessment was acquiescence by those nonunion members.[198] The collection of the fee in an escrow account until challenges could be heard administratively with a payback of the successfully challenged portion of the fee was appropriate.

An example of an unfair labor practice was the denial of continued employment of a probationary police officer who had testified at another unfair labor practice hearing.[199] The court affirmed the lower court's finding that evidence was strong enough to infer that the poor evaluation resulted from the probationary officer's testimony in the other case. A Florida court found that it was an unfair labor practice for the union faculty to use a letter in the school newspaper to solicit student petitions for a full summer school program.[200] In another Florida case, the court found it improper for the union to request negotiations in the change of a position within the institution, but the union could ask to negotiate about the impact of the change on other employees.[201] A South Dakota court found that valid job-related reasons resulted in the termination of a librarian and, therefore, the decision to terminate was not an unfair labor practice.[202] Denial of tenure of a faculty member who refused to avail himself of the union grievance procedures resulted in a suit. The court agreed with the arbitrator's finding of no arbitrable claim against either the institution or the union representatives.

In another case, an arbitrator could not deal with a case filed five years after an employment action when the negotiated contract allowed fifteen days to file a grievance.[203] A New York court upheld an arbitrator's ruling that the state had violated the union contract when it failed to use the proper formula to calculate the salary of part-time employees who were moved to full-time positions.[204] In a disagreement over payment for meals when working overtime, the court ruled that the union's claim would only cover the six years preceding this action.[205]

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[197] *See* The Yearbook of Education Law 1992 at 193, Weaver v. University of Cincinnati, 764 F. Supp. 1241 (S.D. Ohio 1991), *rev'd and remanded*, 942 F.2d 1039 (6th Cir. 1991).

[198] Weaver v. University of Cincinnati, 970 F.2d 1523 (6th Cir. 1992).

[199] Trustees of the Cal. State Univ. v. Public Employment Relations Bd., 8 Cal. Rptr.2d 60 (Ct. App. 1992).

[200] United Faculty of Fla. v. Florida Bd. of Regents, 585 So. 2d 991 (Fla. Dist. Ct. App. 1991).

[201] Pensacola Junior College Faculty Ass'n v. Board of Trustees of Pensacola Junior College, 593 So. 2d 254 (Fla. Dist. Ct. App. 1992).

[202] McCauley v. South Dakota Sch. of Mines, 488 N.W.2d 53 (S.D. 1992).

[203] Commonwealth v. United Plant Guard Workers, Local 509, 612 A.2d 645 (Pa. Commw. Ct. 1992).

Administrator and Staff Terminations

Extensive litigation over the termination of administrators and staff occurred in the past year. Claims surrounded questions of jurisdiction, violations of constitutional rights, and the employee's rights under the employment contract.

A Texas court dismissed a college secretary's employment claim when she failed to timely replead the case.[206] A group of employees accused of theft were arrested. They sued claiming malicious prosecution, false arrest, abuse of process, libel, and slander.[207] The court of appeals reversed the lower court decision to dismiss, finding that issues on the abuse of process claim should go to the jury.[208] A Missouri court found that the city community college district was entitled to sovereign immunity from an administrative assistant's claim of wrongful discharge and negligent supervision.[209] A North Carolina court ruled that the state personnel commission had jurisdiction over discrimination claims in the reorganization of a university police department.[210]

An Alabama plaintiff moved to amend her section 1981 claim to request a jury trial and damages consistent with the Civil Rights Act of 1991. The federal district court approved the plaintiff's motion and the retroactive application of the punitive damage allowance under the 1991 Act.[211] A federal district court refused to dismiss a section 1981 claim against a District of Columbia university filed by a white male. The court found that there was evidence of a continuing violation meeting the equitable tolling requirements, and that a sufficiently stated claim of race discrimination had been presented to warrant a hearing and a decision.[212] A New York court ruled that filing a complaint with EEOC did not bar the state claim.[213] A black Minnesota college administrator was discharged for a legitimate nondiscriminatory reason (poor work performance).[214] In another Minnesota case, material issues as to whether gender was a bonafide occupational qualification in the assignment of custodians to male and female dormitories required adjudication.[215]

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[204] *In re* State of N.Y., 579 N.Y.S.2d 214 (App. Div. 1992).

[205] Nassau Chapter Civil Serv. Employees Ass'n, Local 830 v. County of Nassau, 585 N.Y.S.2d 966 (Sup. Ct. 1992).

[206] Kutch v. Del Mar College, 831 S.W.2d 506 (Tex. Ct. App. 1992).

[207] *See* THE YEARBOOK OF EDUCATION LAW 1992 at 186, Parkin v. Cornell Univ., Inc., 562 N.Y.S.2d 1013 (App. Div. 1990).

[208] Parkin v. Cornell Univ., 577 N.Y.S.2d 227 (N.Y. 1991).

[209] Aiello v. St. Louis Community College Dist., 830 S.W.2d 556 (Mo. Ct. App. 1992).

[210] Edwards v. University of N.C., 421 S.E.2d 383 (N.C. Ct. App. 1992).

[211] Watkins v. Bessemer State Tech. College, 782 F. Supp. 581 (N.D. Ala. 1992).

[212] Holland v. Board of Trustees of the Univ. of D.C., 794 F. Supp. 420 (D.D.C. 1992).

[213] Rosa v. Blake Business Sch., 582 N.Y.S.2d 213 (App. Div. 1992).

[214] Richmond v. Board of Regents of Univ. of Minn., 957 F.2d 595 (8th Cir. 1992).

A question of due process rights was before the courts in the one-day suspension of an administrator for misconduct.[216] A state court found he lacked a due process right for this type of disciplinary action. In a Kansas case, the court found that the dismissed administrator lacked a property interest upon which to base a claim of due process in dismissal.[217] A Wyoming college administrator who disagreed with her new job responsibilities refused to go to work. The federal appeals court found that she was provided procedural due process in her termination but reversed the lower court finding that the age discrimination claim was time barred.[218] A Minnesota court found that the hearing provisions under the Veterans Preference Act applied to the layoff of nonacademic university employees.[219]

A First Amendment violation was claimed by a North Carolina community college employee who claimed that he was dismissed for his political affiliations. The employee sued the Republican dominated board of trustees.[220] The court reversed in part the previous summary judgment finding that material facts required the adjudication of the claim of discharge based on political motivation.[221] A Kansas community college administrator claimed that he was discharged for his pronouncements on the financial mismanagement of the institution, which he said was implied in his note of protest for his reassignment to a new position during his terminal contract year.[222] The court found that the plaintiff failed to establish a link between alleged First Amendment pronouncements and the institution's employment decision. The Supreme Court of North Carolina found that the librarian's public expressions regarding the effects of moving an important museum collection outweighed the academic vice president's need for efficient management through the dismissal of the dissenting employee.[223] The court remanded the case for adjudication on the issues. Two New Mexico university employees circulated a petition critical of the administration of the university and were fired by the president. The court found that the petition was protected speech and found proper the award of damages to the employees.[224] A case involving the release of a market survey study by an employee who was discharged did not implicate the First Amendment as a matter of public concern.[225]

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[215] Hernandez v. University of St. Thomas, 793 F. Supp. 214 (D. Minn. 1992).

[216] Frye v. Louisiana State Univ. Medical Center, 584 So. 2d 259 (La. Ct. App. 1991).

[217] Johnson v. Wefald, 779 F. Supp. 154 (D. Kan. 1991).

[218] Aronson v. Gressly, 961 F.2d 907 (10th Cir. 1992).

[219] Winberg v. University of Minn., 485 N.W.2d 325 (Minn. Ct. App. 1992).

[220] *See* THE YEARBOOK OF EDUCATION LAW 1990 at 217, McKinney v. Board of Trustees, 713 F. Supp. 185 (W.D.N.C. 1989).

[221] McKinney v. Board of Trustees of Mayland Community College, 955 F.2d 924 (4th Cir. 1992).

[222] Hullman v. Board of Trustees of Pratt Community College, 950 F.2d 665 (10th Cir. 1991); *see* THE YEARBOOK OF EDUCATION LAW 1991 at 210, Hullman v. Board of Trustees of Pratt Community College, 732 F. Supp. 91 (D. Kan. 1990), 725 F. Supp. 1536 (D. Kan. 1989).

[223] Corum v. University of N.C., 413 S.E.2d 276 (N.C. 1992).

A secretary who alleged that the institution failed to accommodate her handicap failed to show a *prima facie* violation of the District of Columbia human rights law.[226] In New York, a dismissed employee was unable to show that a private university lawyer was a state entity meeting the state entity requirements for a conspiracy suit in the prosecution of his dismissal claim under section 1983.[227] The discovery of stolen property, while in possession of a legitimate search warrant, made the evidence useable in court against the terminated university employee.[228]

Contract claims were before the courts in a number of termination cases. A community college president successfully claimed that he had withdrawn his resignation when he asked that it be rescinded before the board of trustees had acted on it.[229] In New York, the court found that the administrative employee had failed to exhaust administrative remedies before going to court with the breach of contract through termination claim.[230] A Louisiana court found that the civil service commission had sole jurisdiction over claims by university civil service employees.[231] Finally, an Ohio court found that a retitled job had essentially the same responsibilities as the previous position, qualifying the job holder with the right under the civil service laws to claim the new job.[232]

Whether the contract gave the discharged employee a property right was an issue to be resolved by the lower court in Alabama.[233] A Kansas court found that the decision not to renew a librarian followed the due process procedures as spelled out in the employment contract.[234] A Louisiana court found that the trial court evidence did not support the allegation that the athletic director had a contract for a specific term.[235] In another case, letters outlining benefits and annual salaries did not alter the at-will employment status of food service employees under their contract.[236]

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[224] Sanchez v. Sanchez, 777 F. Supp. 906 (D.N.M. 1991).

[225] Barnhill v. Board of Regents of Univ. of Wis. Sys., 479 N.W.2d 917 (Wis. 1992); *see* THE YEARBOOK OF EDUCATION LAW 1992 at 183, Barnhill v. Board of Regents of Univ. of Wis. Sys., 462 N.W.2d 249 (Wis. Ct. App. 1990).

[226] American Univ. v. District of Columbia Comm'n on Human Rights, 598 A.2d 416 (D.C. 1991).

[227] Peavey v. Polytechnic Inst. of N.Y., 775 F. Supp. 75 (E.D.N.Y. 1991).

[228] Mahlberg v. Mentzer, 968 F.2d 772 (8th Cir. 1992).

[229] DeWitt v. Gainous, 601 So. 2d 103 (Ala. Civ. App. 1992).

[230] Cady v. Clark, 575 N.Y.S.2d 201 (App. Div. 1991).

[231] Leger v. Louisiana State Univ., 601 So. 2d 20 (La. Ct. App. 1992).

[232] State *ex rel.* Allen v. Bowling Green State Univ., 580 N.E.2d 855 (Ohio Ct. Comm. Pl. 1990).

[233] Davis v. University of Montevallo, 586 So. 2d 27 (Ala. Civ. App. 1991).

[234] Kosik v. Cloud County Community College, 827 P.2d 59 (Kan. 1992).

[235] Brodhead v. Board of Trustees for State Colleges and Univs., 588 So. 2d 748 (La. Ct. App. 1991).

A Tennessee court found that the institution had legitimate cause (damage to university property) for the dismissal of a maintenance worker.[237] A North Carolina appellate court found that it was not insubordination when a worker refused, because of the dangers, to remove asbestos from an area.[238] Due process was not violated when an institution and a terminated worker reached a pretrial settlement approved by a referee. The later dismissal of this employee resulted in further litigation over a number of claims of which only a defamation and breach of contract claim remain.[239] Under an Alaska employment contract, the institution must show good cause, rather than good faith dissatisfaction, to dismiss a probationary employee.[240] A Louisiana federal district court denied a motion for a summary judgment where issues existed as to the denial of due process and defamation in the termination of a community college basketball coach.[241]

In a defamation case, a trustee sent letters to various people informing them that two administrators were plotting to lay off blacks and women. The result was the dismissal of the two administrators. The court affirmed a lower court finding that the trustee had libelled the administrators and remanded the case for the proper award of damages which the lower court had failed to award.[242] An Alabama administrator who discharged a university attorney and included negative comments in an exit report which was read to future employers, was found to have stigmatized the attorney.[243] Finally, statements made by the president in announcing the appointment of a new athletic director were not found to be defamatory toward the terminated athletic director.[244]

Employee Benefits

Litigation related to the award of employee benefits was extensive again this year. Issues surrounding retirement, unemployment compensation, health insurance, merit salary increases, and other fringe benefits will be reviewed in this section. The lead off case involved a claim of an equal protection violation in the exclusion of extension agents from the

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236. Dalton v. University of Ala., 591 So. 2d 93 (Ala. Civ. App. 1991).
237. Goins v. University of Tenn. Memorial Research Center, 821 S.W.2d 942 (Tenn. Ct. App. 1991).
238. Urback v. East Carolina Univ., 414 S.E.2d 100 (N.C. Ct. App. 1992).
239. Baker v. Southern Univ., 590 So. 2d 1313 (La. Ct. App. 1991), *remanded*, 604 So. 2d 699 (La. Ct. App. 1992).
240. University of Alaska v. Tovsen, 835 P.2d 445 (Alaska 1992).
241. Folse v. Delgado Community College, 776 F. Supp. 1133 (E.D. La. 1991).
242. Chonich v. Wayne County Community College, 973 F.2d 1271 (6th Cir. 1992).
243. Goffer v. Marbury, 956 F.2d 1045 (11th Cir. 1992).
244. Livingston v. Murray, 612 A.2d 443 (Pa. Super. Ct. 1992).

university employee retirement program. The university designed a non-contributing retirement system for university employees in which the university contributed 6.56% of the employee's salary into a retirement plan. The extension agents, through the United States Department of Agriculture, belonged to the United States Civil Service Retirement System to which the University contributed 7% of the extension agent's salary. On appeal, the court affirmed the lower court ruling that the exclusion of extension agents from the university's retirement program was neither arbitrary nor a violation of the equal protection clause.[245] An electrical subcontractor, doing work on a Massachusetts institution's property, failed to pay the employee benefits attributable to the work. The retirement fund and the electrical employee's union sued to have a lien placed on the institute's property to recover the unpaid benefits. The federal circuit court affirmed the lower court decision that a lien against a third party was not an option under the Employees Retirement Income Security Act of 1974.[246]

Retirement benefits were subject to several claims. For example, a Pennsylvania faculty member sought to purchase service credits for the time he was a graduate assistant at the institution. The court found that the student status as a graduate assistant did not preclude the purchase of service credits, but that the rate would be at 75% of a full workload since that was the nature of the graduate assistant assignment.[247] An Arizona court found that the university was not required to pay matching funds into the state retirement program until the faculty member had paid into the fund for the requisite five years.[248] An Illinois university employee who was transferred from the university to the university hospital administrative unit, was not terminated and, therefore, was not entitled to payment of pension funds.[249] Finally, a dependent of a deceased pension fund participant failed to notify the pension fund of her withdrawal from a technical institute and continued to receive payments for a full year. The dependent filed for bankruptcy and attempted to have the debt to the pension fund discharged. The court found the debt nondischargeable under the principle of false representation.[250]

Unemployment compensation was at issue in a New York case. A terminated university employee was paid temporary disability leave and annual leave equal to the salary for a higher education officer's position and was, therefore, not eligible for unemployment compensation.[251] A faculty member's claim for unemployment compensation during summer recess was denied by the court.[252]

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[245] Massey v. McGrath, 965 F.2d 678 (8th Cir. 1992).

[246] McCoy v. Massachusetts Inst. of Technology, 760 F. Supp. 12 (D. Mass. 1991), *aff'd*, 950 F.2d 13 (1st Cir. 1991).

[247] Kapilian v. State Employees' Retirement Sys., 600 A.2d 698 (Pa. Commw. Ct. 1991).

[248] Kaku v. Arizona Bd. of Regents, 836 P.2d 1006 (Ariz. Ct. App. 1992).

[249] Pehr v. University of Chicago, 799 F. Supp. 862 (N.D. Ill. 1992).

[250] *In re* Gadus, 145 B.R. 235 (Bankr. N.D. Ohio 1992).

[251] *In re* Fuchs, 575 N.Y.S.2d 989 (App. Div. 1991).

Compensatory leave was at issue in a Louisiana case. An unclassified employee attempted to recover unused compensatory leave. The court found that the employee's contract allowed for compensatory leave and that the employee should be paid one hour of wages for each hour of accrued compensatory leave.[253] In a health benefits claim, the court found that the plaintiff's condition of incompetence was the reason for the lapse in health care benefit payments, and health expenses were covered during the lapse in payments.[254] In another health care benefits case, the former employee's failure to inform her employer that she was disabled for sixty days still entitled her to continuation of benefits, when the employer failed to notify her of the extension of benefits as authorized under The Comprehensive Omnibus Budget Reconciliation Act.[255] A bank employee was entitled to receive tuition reimbursement for the previous semester while she was employed even though the reimbursement would be awarded after her termination.[256] The tuition agreement linked reimbursement to active employment.

In a claim over deferred compensation funds of a medical doctor who was also a faculty member at a university hospital, the court ruled that, at termination, he would not be able to recover all funds from a clinical practice at the university hospital paid into the deferred compensation fund.[257] Requiring a prison teacher to do clerical work during prison lockdowns because classes could not be held did not constitute demotion.[258] In a claim over merit pay, the court ruled that the faculty member did not have a property interest in the award of merit pay requiring due process.[259] The court also found that even if there was a contractual right that merit pay be determined by the process spelled out by the department, a property right mandating due process procedures did not exist. In Texas, an institution refused to reimburse travel to Nicaragua by order of the state's governor. The faculty member claimed the denial of travel reimbursement was an infringement on the professor's political belief and a violation of the equal protection clause. The court found that a property right to travel reimbursement did not exist.[260]

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[252] Armstrong v. Employment Div., 832 P.2d 1233 (Or. Ct. App. 1992).

[253] Knecht v. Board of Trustees for State Colleges, 591 So. 2d 690 (La. 1991); *see* THE YEARBOOK OF EDUCATION LAW 1992 at 191, Knecht v. Board of Trustees for State Colleges, 577 So. 2d 730 (La. Ct. App. 1991).

[254] Sirkin v. Phillips Colleges, Inc., 779 F. Supp. 751 (D.N.J. 1991).

[255] Poole v. Monmouth College, 603 A.2d 118 (N.J. Super. Ct. 1991).

[256] Tripodo v. Chase Manhattan Bank, N.A., 576 N.Y.S.2d 760 (White Plains City Ct. 1991).

[257] Zitelli v. Dermatology Educ. and Research Found., 597 A.2d 1173 (Pa. Super. Ct. 1991).

[258] Indiana State Prison and State Employees Appeals Comm'n v. Van Ulzen, 582 N.E.2d 789 (Ind. 1991).

[259] Swartz v. Scruton, 964 F.2d 607 (7th Cir. 1992).

Sexual Harassment

A sexual harassment case was moved to the federal district court because a United States Army officer assigned to a university's ROTC program sexually harassed a university employee.[261] The federal appellate court ruled that federal court jurisdiction was correct when an employee of the United States was involved.[262]

Another sexual harassment case involved a student who broke off an intimate relationship with a law professor, who continued to harass her in an attempt to reestablish the relationship. After an out of court agreement between the university and the two parties, the professor continued the harassment in violation of the agreement. The court refused to grant the request of the university for summary judgment on the student's breach of agreement claim and breach of contract as defined through the faculty handbook claim.[263] In a case involving the withholding of tenure until after the completion of a sexual harassment investigation, the court refused to grant the university a summary judgment.[264] Material issues exist on several matters including whether the university departed from its sexual harassment policies when it commenced this investigation.

In Kansas, a court found that the university was liable for the behavior of a department head who sexually harassed a secretary who was subsequently terminated.[265] The supervisor and the dean failed to take action after knowing of the sexual harassment of a previous secretary, which constituted negligence in failing to adequately respond to a hostile environment. Finally, the Fifth Circuit Court of Appeals affirmed a lower court decision that termination was not in retaliation for reporting sexual harassment, but rather for the falsification of a sexual harassment report.[266] The case was remanded to determine whether malice was present for officials charged with defamation.

Students

Admissions

In a civil rights case in Alabama, a class action challenged the State Board of Education's use of minimum scores on the ACT test for admissions to undergraduate teacher training programs.[267] The court declared the policy illegal under title VI. Furthermore, the court found that the ACT test requirement resulted in substantial adverse racial impact, primarily because there was a wide gap between median scores for blacks and those for whites. There was no evidence presented that the scores on the ACT test correlated with competence to teach.

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[260] Nelson v. Clements, 831 S.W.2d 587 (Tex. Ct. App. 1992).

[261] *See* THE YEARBOOK OF EDUCATION LAW 1992 at 192, McHugh v. University of Vt., 758 F. Supp. 945 (D. Vt. 1991).

[262] McHugh v. University of Vt., 966 F.2d 67 (2d Cir. 1992).

[263] George v. University of Idaho, 822 P.2d 549 (Idaho Ct. App. 1991).

[264] Marshall v. University of Haw., 821 P.2d 937 (Haw. Ct. App. 1991).

[265] Campbell v. Kansas State Univ., 780 F. Supp. 755 (D. Kan. 1991).

[266] Wilson v. University of Tex. Health Center, 773 F. Supp. 958 (E.D. Texas 1991), *aff'd in part, rev'd in part*, 973 F.2d 1263 (5th Cir. 1992).

Several cases involved the private right of action. The Washington Legal Foundation and several white students brought suit against the Department of Education, alleging that the Department failed to enforce title VI of the Civil Rights Act of 1964 anti-discrimination laws by granting minority student scholarships. The court dismissed the suit, ruling that there was no private cause of action under title VI.[268]

In Illinois, the court of appeals ruled on an earlier decision to dismiss the complaint of a former student who sued his university for negligent admission and educational malpractice.[269] The court upheld the decision that Illinois law does not recognize the tort of educational malpractice or provide a cause of action for negligent admission.[270] However, the court remanded the contractual claims finding that while the court could not second guess the professional judgment of the university faculty on academic matters, it could adjudicate whether the university breached its commitment and failed to provide the student any real access to its academic curriculum.

Finally, the court of appeals ruled on a case in which an applicant to a state university's doctoral program claimed that he was denied admission to the program because of his age.[271] The court ruled that the plaintiff did exhaust his state administrative remedies and remanded his ADEA claim for further adjudication. The court further ruled that the state did not qualify as a person under section 1983 and affirmed the district court's dismissal of that claim.

Financial Aid

This area again saw heavy litigation. The issues involved institutional eligibility, contracts with guaranty agencies, jurisdiction, right of action, aid to the handicapped, chapter 7 and chapter 13 bankruptcy, undue hardship, and child support for college expenses.

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[267] Groves v. Alabama State Bd. of Educ., 776 F. Supp. 1518 (M.D. Ala. 1991).

[268] Washington Legal Found. v. Alexander, 778 F. Supp. 67 (D.D.C. 1991).

[269] *See* THE YEARBOOK OF EDUCATION LAW 1991 at 234. Ross v. Creighton Univ., 740 F. Supp. 1319 (N.D. Ill. 1990).

[270] Ross v. Creighton Univ., 957 F.2d 410 (7th Cir. 1992).

[271] Kaimowitz v. Board of Trustees of the Univ. of Ill., 951 F.2d 765 (7th Cir. 1991).

The lead-off case involves the appeal of a decision granting summary judgment supporting a state university's minority scholarship program.[272] The court of appeals reversed this decision, ruling that the university must establish that the program remedied present effects of past title IV violations.[273] It remanded the action to the district court for determination on this issue with instructions that if no evidence is available, summary judgment for the appellant would be appropriate.

Two cases appeared that dealt with section 435(a) of the Higher Education Act, which rules an institution ineligible to participate in federal student aid programs if the institution's default rate is in excess of 35% for 1991 and 1992, or 30% for succeeding fiscal years. A proprietary school association and several schools filed suit against the Department of Education alleging that the regulations violated the controlling statute and were promulgated in violation of due process laws and the Administrative Procedures Act.[274] The court ruled in favor of the Secretary of Education, holding that Congress intended the statute to refer to the year in which the determinations of eligibility were made. In addition, the statute was not applied retroactively and did not violate the due process clause. In the other case, two dental colleges appealed the Secretary of Education's ruling that they were ineligible to participate in guaranteed student loan programs because their default rates exceeded 35%.[275] The colleges argued that these rates were calculated erroneously. The court found that although the colleges are not entitled to an evidentiary hearing, the appeals process was implemented in an arbitrary and capricious manner. They vacated the ineligibility decision and remanded the case to the Department to consider additional data submitted by the colleges.

The United States Claims Court agreed to suspend consideration of a claim by a school of court reporting against the United States for reimbursement of federal student financial aid programs. The school cannot be reimbursed before an audit of the funds has been submitted to the Department of Education.[276]

In Rhode Island, a student loan purchaser brought a declaratory action against a student loan servicer in a case that involved contractual disputes regarding servicing of student loans.[277] The state supreme court ruled that because final judgment on merits of the action was reached in a previous case between the two parties, the current claims were barred under the doctrine of *res judicata.* In a similar suit, *res judicata* denied access in federal court of a state court jurisdictional decision.[278] In another case, the court ruled that a former student borrower did not have the ability to sue a business school based on alleged violations of title VI of the Higher Education Act.[279] At issue was excess loan money over and above tuition and fees which the school refused to relinquish to the plaintiff for living expenses. The court ruled that enforcement was given to the Secretary of Education.

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[272] *See* THE YEARBOOK OF EDUCATION LAW 1992 at 198, Podberesky v. Kirwan, 764 F. Supp. 364 (D. Md. 1991).

[273] Podberesky v. Kirwan, 956 F.2d 52 (4th Cir. 1992).

[274] Association of Accredited Cosmetology Schs. v. Alexander, 774 F. Supp. 655 (D.D.C. 1991).

[275] Atlanta College of Medical & Dental Careers, Inc. v. Alexander, 792 F. Supp. 114 (D.D.C. 1992).

[276] Burbank College of Court Reporting, Inc. v. United States, 26 Cl. Ct. 323 (Cl. Ct. 1992).

[277] Rhode Island Student Loan Auth. v. Nels, Inc., 600 A.2d 717 (R.I. 1991).

Several cases involved financial aid for persons with disabilities. In Ohio, the court of appeals ruled that the Bureau of Services for the Visually Impaired was required to calculate the amount it would contribute to a visually-impaired student at a public institution.[280] This funding cannot be withdrawn if the student chooses to attend a private institution. The Court of Appeals of Utah affirmed a decision by a state agency to deny reimbursement of transportation costs for a handicapped person.[281] The agency had developed a financial assistance plan for her, but after she qualified for federal assistance determined that the Pell Grant was a comparable benefit and must be used to cover transportation.

The issue of the amendment to the Higher Education Act that requires excess reserves from guaranty agencies to be transferred to the Department of Education was in the courts again. In Colorado, the court of appeals ruled that this provision does not constitute deprivation of private property without fair compensation and is therefore not unconstitutional.[282] A state student loan guaranty agency in Virginia filed a similar suit against the DOE alleging that the statute violated the Constitution's Fifth Amendment, constituted a breach of contract, and was an unconstitutional enactment of a tax that discriminated against states.[283] The court ruled in favor of the DOE. The court also ruled for the DOE when it affirmed a district court's ruling that the DOE did not act arbitrarily when it refused to reimburse a state agency for administrative expenses related to the federal student loan program.[284] In a case involving DOE grants for educating incarcerated students in correctional facilities, a court granted summary judgment in favor of prorating Pell Grants for the actual cost of educating these students.[285]

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[278] Deckert v. Wachovia Student Fin. Serv., 963 F.2d 816 (5th Cir. 1992).

[279] L'Ggrke v. Benkula, 966 F.2d 1346 (10th Cir. 1992).

[280] Mosholder v. Ohio Rehabilitation Serv. Comm'n, 598 N.E.2d 1271 (Ohio Ct. App. 1991).

[281] Holland v. State Office of Educ., 834 P.2d 596 (Utah Ct. App. 1992).

[282] Colorado v. Cavazos, 962 F.2d 968 (10th Cir. 1992).

[283] Virginia State Educ. Assistance Auth. v. Alexander, 770 F. Supp. 1110 (E.D. Va. 1991).

[284] Maine State Bd. of Educ. v. Cavazos, 956 F.2d 376 (1st Cir. 1992).

Bankruptcy questions involving financial aid were again before the courts. The court ruled that the Maryland Higher Education Commission was due moneys from a bankrupt vocational school for tuition refunds for students, for payments due the Maryland Guaranty Student Tuition Fund, and for moneys required to do administrative bookkeeping.[286] Several cases involved qualification of loans for nondischargeability. In one, the bankruptcy court ruled that a loan made by a privately insured loan program is a dischargeable loan.[287] In another case, the court ruled that a bank loan guaranteed by an institution and extensions of credit made to students by institutions qualify as educational expenses and are not dischargeable.[288] The court also ruled that the institution's withholding of the student's transcript, because she was in default, was a violation of an automatic stay.

Other cases involved both timing and qualification issues. A court in Maryland discharged a debt that was in an adversary proceeding before the existence of the statute ruling educational debts as nondischargeable.[289] It also ruled that the credit union to which these debts were assigned does not qualify as a nonprofit institution. Also in Maryland, the district court ruled that a student loan became due on the first date specified by a consolidated loan rather than the original loan.[290] Therefore, the student loan debt is not dischargeable unless the debtor can prove undue hardship. A court of appeals in Kansas ruled that there is no federal or state statute of limitations under which a guarantor is obligated to file suit to recover defaulted student loans.[291] Another court ruled that the federal statute which permitted enforcement action against a defaulted borrower preempted the state statute of limitations.[292] An Arkansas bankruptcy court, in dismissing the suit, ruled that chapter 7 debtors did not serve the proper party within the mandated time period.[293]

In other chapter 7 cases, a bankruptcy court ruled that the statutory seven-year period, after which the loan became dischargeable, began on the due date of the consolidated loan, not on the original loan date, and remanded the case on the hardship question.[294] A federal district court in

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[285] Platt College of Commerce, Inc. v. Cavazos, 796 F. Supp. 22 (D.D.C. 1992).
[286] *In re* Longo, 144 B.R. 305 (Bankr. D. Md. 1992).
[287] *In re* Pilcher, 139 B.R. 948 (Bankr. D. Ariz. 1992).
[288] *In re* Merchant, 958 F.2d 738 (6th Cir. 1992).
[289] *In re* Sinclair-Ganos, 133 B.R. 382 (Bankr. W.D. Mich. 1991).
[290] United States v. McGrath, 143 B.R. 820 (D. Md. 1992).
[291] Higher Educ. Assistance Found. v. Glenn-Healy, 836 P.2d 25 (Kan. Ct. App. 1992).
[292] State of N.Y. Higher Educ. Serv. Corp. v. Starr, 579 N.Y.S.2d 210 (App. Div. 1992).
[293] *In re* McElhaney, 142 B.R. 311 (Bankr. E.D. Ark. 1992).
[294] *In re* Saburah, 136 B.R. 246 (Bankr. C.D. Cal. 1992).

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Pennsylvania found that sovereign immunity prohibited a debtor from recovering the amount collected by the Internal Revenue Service to offset a loan.[295] In a related case, the bankruptcy court ruled that if the IRS had authorized the refund within the ninety-day period that the debtors declared bankruptcy, the debtors could recover the setoff of their tax refund by the IRS against their student loan obligations.[296]

Several chapter 7 cases decided if the general rule of nondischargeability for educational loans applies to all educational debts, whether or not the obligator is a student. In one case, the court ruled that a loan obtained for the debtor's daughter's education qualified under the nondischargeability statute.[297] However, the court ruled that repayment in this case would pose undue hardship. In Massachusetts, the bankruptcy court permitted the cosigner of an educational loan to discharge his debt because the debt was nondischargeable only with respect to the student for whose benefit the loan was made.[298] On appeal, the district court ruled that the debt was an educational loan and was therefore nondischargeable.[299] Similarly, an Ohio cosigner's loan for his wife's education was nondischargeable.[300]

The courts were asked to rule several times on applications of the undue hardship rule. They did discharge several,[301] one specifically because the debtor demonstrated good-faith efforts to maximize his employment opportunities and minimize expenditures.[302] In two cases, the court did not discharge the debt, ruling in one that the debtor's inability to find work was only temporary and did not form a basis for undue hardship,[303] and in the other, the debtor failed to prove hardship.[304]

Several cases addressed Congress's 1990 decision to exempt student loan obligations from the chapter 13 discharge. This provision allows for the discharge of all unsecured loans after conclusion of the debtor's chapter 13 plan, with the exception of education loans. In Iowa, a bankruptcy court refused to confirm a plan that created two classes of unsecured creditors, saying that this discriminated against nonstudent loan creditors.[305] In Nebraska, a bankruptcy court ruled that a chapter 13 plan can separately classify general unsecured claims and unsecured student loans.[306] However, the plan would not discriminate by permitting accelerated payments on the student loans to the detriment of unsecured creditors.

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[295] Hankerson v. United States Dep't of Educ., 138 B.R. 473 (E.D. Pa. 1992).

[296] *In re* Hankerson, 133 B.R. 711 (Bankr. E.D. Pa. 1991).

[297] *In re* Hawkins, 139 B.R. 651 (Bankr. N.D. Ohio 1991).

[298] *In re* Wilcon, 135 B.R. 709 (Bankr. D. Mass. 1992).

[299] *In re* Wilcon, 143 B.R. 4 (D. Mass. 1992).

[300] *In re* Dull, 144 B.R. 370 (Bankr. N.D. Ohio 1992).

[301] *In re* Roberson, 138 B.R. 885 (N.D. Ill. 1992); *In re* Malloy, 144 B.R. 38 (Bankr. E.D. Va. 1992).

[302] Clinton v. Great Lakes Higher Educ. Corp., 133 B.R. 96 (Bankr. N.D. Ohio 1991).

[303] *In re* Webb, 132 B.R. 199 (Bankr. M.D. Fla. 1991).

[304] *In re* Garcia, 135 B.R. 437 (Bankr. S.D. Fla. 1992).

[305] *In re* Cronk, 131 B.R. 710 (Bankr. S.D. Iowa 1990).

The issue of timing of payment was also variable. In Iowa, the court confirmed a chapter 13 plan to pay student loan debts concurrently with secured obligations and before repayment of other unsecured debts.[307] A bankruptcy court in Missouri refused a plan that would have paid 100% of student loan debt while only paying 10% to all other unsecured creditors.[308] Finally, in an opinion citing the Missouri case, an Oklahoma bankruptcy judge ruled that a plan to treat all unsecured loans the same for twenty-six months, and then to extend the plan to only education loans while discharging the rest, was clearly discriminatory.[309]

In other bankruptcy cases, the court ruled that a husband's educational loans were not dischargeable while his wife's were, due to medical problems which prevented her from working.[310] In Indiana, a district court ruled that a debtor whose debts had been discharged in bankruptcy was still obligated to pay back educational loans.[311] In another case, the court ruled that approximately $37,000 of a more than $75,000 student debt was nondischargeable.[312]

There were numerous cases that involved default under service scholarship programs. One case involved a physician who participated in both the Public Health Service Scholarship Training Program and the National Health Service Corps.[313] The court ruled that the physician defaulted under the Public Health Program since he failed to complete his active duty obligation. However, the physician was found not to have defaulted in the National Health Service Program because the Secretary never assigned him to a mandatory health manpower shortage area. In two cases, physicians were placed in default after failing to accept positions in designated health manpower shortage areas.[314] In two other cases, the court ruled in favor of imposing the statutory damages of treble damages plus interest for failing to perform service contracts.[315] In another case, the court ruled that the agency could refuse to accept a physician's services in a medically underserved area instead of a location

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306. *In re* Keel, 143 B.R. 915 (Bankr. D. Neb. 1992).
307. *In re* Foreman, 136 B.R. 532 (Bankr. S.D. Iowa 1992).
308. *In re* Saulter, 133 B.R. 148 (Bankr. W.D. Mo. 1991).
309. *In re* Taylor, 137 B.R. 60 (Bankr. W. Okla. 1992).
310. *In re* Berthiaume, 138 B.R. 516 (Bankr. W.D. Ky. 1992).
311. United States v. Davis, 142 B.R. 293 (S.D. Ind. 1992).
312. *In re* Bakkum, 139 B.R. 680 (Bankr. N.D. Ohio 1992).
313. United States v. St. Thomas, 966 F.2d 476 (9th Cir. 1992).
314. United States v. Arron, 954 F.2d 249 (5th Cir. 1992); United States v. Armstrong, 784 F. Supp. 356 (N.D. Tex. 1991).
315. United States v. Hugelmeyer, 774 F. Supp. 559 (D. Ariz. 1991); United States v. Citrin, 972 F.2d 1044 (9th Cir. 1992).

on the HMSA list.[316] Finally, in a related scholarship question, the Supreme Court of Washington ruled that football players did not have a protected property interest in the renewal of their athletic scholarships.[317]

Several cases dealt with the Higher Education Technical Amendments of 1991 which eliminated the statute of limitations for student loans. In Oregon, the district court ruled that this provision covers all student loans, including claims that were time barred when these Amendments became effective.[318] This provision was also ruled on in Oklahoma when a court ruled that the United States government could commence action on a case previously barred.[319] In a case in Montana, the court ruled that the statute of limitations begins to run at the time of partial payment.[320] A district court in Michigan dismissed a case for lack of subject matter jurisdiction where the case had previously been dismissed with prejudice.[321] In Michigan, a district court granted summary judgment to a debtor in a case where the government had inconclusive and inadmissible evidence of a seventeen-year-old loan debt.[322] In Florida, a district court ruled that the United States could recover costs and attorney fees under the loan's collection clause rather than under the Debt Collection Act.[323]

In a collection case, the court of appeals of Texas upheld a lower court's consolidation of cases filed in district and county courts.[324] A nursing school sought to recover sums owed by a student who was dismissed for academic reasons. The student then alleged negligence on the part of the school in both his answer and a separate suit filed in a different court. The court granted summary judgment to the school on the negligence claims.

There were many cases involving payment of college expenses by divorced parents. In several cases where the marital settlement made provisions for college expenses, the court ordered the father to help pay expenses.[325] The court in one case ruled that the lower court could not issue a temporary injunction pending litigation on the obligation to pay college expenses.[326] In Indiana, the court of appeals ruled that trial courts are bound by local rules and, therefore, a previous decision to award additional payments in a divorce settlement was reversed.[327] The local rule prohibits the court from entertaining a modification petition until a year after the last support order prevailed.

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[316] United States v. Gary, 963 F.2d 180 (8th Cir. 1992).
[317] Conrad v. University of Wash., 834 P.2d 17 (Wash. 1992).
[318] United States v. Wall, 794 F. Supp. 350 (D. Or. 1992).
[319] United States v. Walker, 795 F. Supp. 1073 (N.D. Okla. 1992).
[320] United States v. Nugent, 785 F. Supp. 129 (D. Mont. 1991).
[321] United States v. Swor, 139 F.R.D. 100 (E.D. Mich. 1991).
[322] United States v. Rhodes, 788 F. Supp. 339 (E.D. Mich. 1992).
[323] United States v. Spann, 797 F. Supp. 980 (S.D. Fla. 1992).
[324] Guinn v. Texas Christian Univ., 818 S.W.2d 930 (Tex. Ct. App. 1991).
[325] Brower v. Brower, 604 A.2d 726 (Pa. Super. Ct. 1992); Fritch v. Fritch, 586 N.E.2d 427 (Ill. App. Ct. 1991); Prawius v. Allford, 590 So. 2d 338 (Ala. Civ. App. 1991).
[326] Harper v. Powell, 821 S.W.2d 456 (Tex. Ct. App. 1992).

In several cases where the divorce decree did not make provisions for college education or was ambiguous in its language, the courts did not order the parent to pay expenses or costs that went beyond the language of the settlement.[328] Two courts ordered both parents to share the costs.[329] In other cases, the court modified divorce decrees to include payment of college expenses.[330] In one case, an estate was ordered to pay for the college expenses of the former wife's children.[331] In a similar case in New Hampshire, the court ruled that the estate was not required to pay college expenses.[332] In another case, the court of appeals of Ohio ruled that a former husband can be held in contempt, based on his ability to pay, for failing to pay the parties' son's private college expenses, when at the time of the settlement agreement, private college education was in contemplation.[333] In one case, the divorced father relied on the defense of estrangement. The Superior Court of Pennsylvania affirmed in part a ruling that this defense could not be relied upon.[334]

In Minnesota, an appeals court ruled that since the trial court overvalued the marital and nonmarital interests, it abused its discretion by requiring a wife to pay her former husband for college expenses.[335] In Alabama, the court affirmed a ruling that a disabled father must help pay for his son's education.[336] However, the courts would terminate this obligation if the child failed to live up to the terms of the agreement. In South Carolina, the court of appeals ruled that a father did not have to reimburse his daughter for college expenses when the daughter did not minimize expenses and/or when she failed to maintain a "B" average.[337] The child's age was also a factor. A New York court terminated a father's obligation to pay his son's support because the son was not a matriculated full-time student at the time of his twenty-first birthday.[338]

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[327] Cavazzi v. Cavazzi, 597 N.E.2d 1289 (Ind. Ct. App. 1992).

[328] Bell v. Bell, 587 So. 2d 558 (Fla. Dist. Ct. App. 1991); Kidd v. Kidd, 832 P.2d 566 (Wyo. 1992); Thompson v. Thompson, 587 So. 2d 357 (Ala. Civ. App. 1991); Uram v. Uram, 582 N.E.2d 1060 (Ohio Ct. App. 1989).

[329] *In re* Marriage of Kuhn, 581 N.E.2d 380 (Ill. App. Ct. 1991); Lewis v. Winslow, 587 So. 2d 1006 (Ala. Civ. App. 1991).

[330] Donegan v. Donegan, 586 N.E.2d 844 (Ind. 1992); Reeves v. Reeves, 584 N.E.2d 589 (Ind. Ct. App. 1992); Umphenour v. Umphenour, 831 S.W.2d 764 (Mo. Ct. App. 1992).

[331] *In re* Marriage of Oldham, 584 N.E.2d 385 (Ill. App. Ct. 1991).

[332] Dupuis v. Click, 604 A.2d 576 (N.H. 1992).

[333] Forstner v. Forstner, 588 N.E.2d 285 (Ohio Ct. App. 1990).

[334] O'Connell v. O'Connell, 597 A.2d 643 (Pa. Super. Ct. 1991).

[335] Freking v. Freking, 479 N.W.2d 736 (Minn. Ct. App. 1992).

[336] Crawford v. Bullock, 587 So. 2d 363 (Ala. Civ. App. 1991).

[337] McDuffie v. McDuffie, 418 S.E.2d 331 (S.C. Ct. App. 1992).

[338] Lawrence v. Lawrence, 579 N.Y.S.2d 162 (App. Div. 1992).

In Pennsylvania, a court ruled that a twenty-one year old was emancipated and that his mother was not obligated to contribute to his education.[339] In two other cases, the courts ruled that if payment is ordered, it must contain temporal or academic progress restrictions upon continued payment of support.[340] The court of appeals agreed with a lower court ruling that there could not be specific enforcement of a provision in a settlement agreement requiring a father to assist in paying college expenses where there was no mutuality.[341]

In criminal cases, the United States Court of Appeals for the First Circuit affirmed the conviction of a corporate defendant for mail fraud in false student loan applications.[342] The Supreme Court of Kansas affirmed a trial court's finding that defendants were guilty of multiple counts in connection to falsifying student loan applications.[343]

Student Organizations

Two of the cases this year involved fraternities. In Virginia, the court granted summary judgment against a state university's imposition of discipline against a fraternity's caricatures of "ugly women."[344] The court ruled that the university, rather than regulate conduct, unconstitutionally sought to restrict expression that it found offensive. Moreover, the contest did not disrupt the educational mission of the university, as the university contended, but was consistent with that mission in promoting the free flow and expression of ideas.

The Supreme Court of New York upheld the dismissal of a proceeding to annul a private university's suspension of a fraternity for violation of the university's antihazing policy.[345] It ruled that because the state was not involved in what would otherwise be a private activity, a fraternity and its members were not entitled to a full array of due process guarantees. Since the university complied with its established guidelines for a disciplinary proceeding, the action was not arbitrary or capricious.

In another hazing-related case involving a lacrosse club member's death from alcohol poisoning, the court ruled that the hazing statute was not unconstitutionally over broad or vague.[346] Furthermore, the statute does not promote arbitrary enforcement because hazing charges can be brought only when the activity resulted in reckless, knowing, or intentional physical injury of a person.

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[339] Marino v. Marino, 601 A.2d 1240 (Pa. Super. Ct. 1992).

[340] Hocutt v. Hocutt, 591 So. 2d 881 (Ala. Civ. App. 1991); Kent v. Kent, 587 So. 2d 409 (Ala. Civ. App. 1991).

[341] Rosen v. Rosen, 413 S.E.2d 6 (N.C. Ct. App. 1992).

[342] United States v. Wilfred Am. Educ. Corp., 953 F.2d 717 (1st Cir. 1992).

[343] State v. Edwards, 826 P.2d 1355 (Kan. 1992).

[344] Iota XI Chapter of Sigma Chi Fraternity v. George Mason Univ., 773 F. Supp. 792 (E.D. Va. 1991).

[345] Mu Chapter of Delta Kappa Epsilon v. Colgate Univ., 578 N.Y.S.2d 713 (App. Div. 1992).

[346] People v. Anderson, 591 N.E.2d 461 (Ill. 1992).

In Virginia, the court granted summary judgment against an unincorporated association which was denied funding from mandatory student fees.[347] The university's guidelines permitting funding only to organizations which contributed to the educational focus of the university did not deny the association's constitutional rights of protection against viewpoint discrimination or burden their free exercise of religion.

First Amendment

Freedom of Speech. The lead-off case involved university hate speech policies. A district court in Wisconsin granted summary judgment against a university system's rule prohibiting students from directing discriminatory remarks at particular individuals, with an attempt to demean them and create a hostile educational environment.[348] The court found that since the rule covers a number of situations where no breach of peace is likely to result, the rule is over broad. In addition, the rule does not specify whether the speaker must actually demean the listener or merely intend to do so. The rule is therefore unconstitutionally vague.

The Fifth Circuit Court of Appeals ruled in one case that a university's regulations against on-campus solicitation, prohibiting the distribution of a free, nonstudent-funded newspaper with advertising, was unconstitutionally restrained free expression.[349] The second case was one that was in the courts previously.[350] The Second Circuit Court of Appeals affirmed allocation of activity fee money to a student group whose speech some students disagreed with, but ruled that the group must spend on each campus an amount equivalent to its fee receipts.[351] In addition, the court ruled that the group must eliminate its automatic membership scheme whereby all students are claimed as members.

A First Amendment issue involving the showing of a controversial film was rendered moot by the actual showing of the film.[352] The court remanded the case for consideration on a claim for nominal damages. In Minnesota, a district court upheld a university policy prohibiting recruitment activity on campus.[353] The court ruled that recruitment speech is commercial speech and, as such, is subject to the university's reasonable restrictions on commercial speech.

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[347] Rosenberger v. Rector and Visitors of Univ. of Va., 795 F. Supp. 175 (W.D. Va. 1992).

[348] UWM Post, Inc. v. Board of Regents of Univ. of Wis. Sys., 774 F. Supp. 1163 (E.D. Wis. 1991).

[349] Hays County Guardian v. Supple, 969 F.2d 111 (5th Cir. 1992).

[350] *See* THE YEARBOOK OF SCHOOL LAW 1985 at 338, Carroll v. Blinken, 575 F. Supp. 772 (S.D.N.Y. 1983); *see* THE YEARBOOK OF EDUCATION LAW 1992 at 204, Carroll v. Blinken, 768 F. Supp. 1030 (S.D.N.Y. 1991).

[351] Carroll v. Blinken, 957 F.2d 991 (2d Cir. 1992).

[352] Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992).

A student group was granted a preliminary injunction in a case which challenged the provision of the Family Educational Rights and Privacy Act (FERPA), which authorizes the withdrawal of federal funding from universities that publish campus law enforcement records containing the names of students.[354] The students used their First Amendment right to receive information as the basis of their challenge.

Freedom of Association. In a case originally filed in 1989, students in California challenged the constitutionality of mandatory student activities fees.[355] The court affirmed decisions in favor of the university and the student body organization but remanded the case for reconsideration in light of a pending supreme court decision.[356] The court of appeals affirmed the earlier rulings, concluding that the intervening case does not lead to a different decision.[357]

Dismissal

Disciplinary Dismissal. A case was back in the courts that involved a former midshipman who was forced to resign from the United States Naval Academy after admitting his homosexuality.[358] On appeal, a federal circuit court ruled that the lower court was in error in finding interrogation into his homosexual conduct relevant to the Academy's decision to reinstate him.[359] In the most recent case, the court granted the Secretary of Defense's motion for summary judgment.[360] The court found that the regulations rationally furthered a state purpose, and that the plaintiff was not a member of a suspect class. Using rational basis review, the court found that the regulations did not violate the plaintiff's equal protection rights.

In Illinois, the court dismissed a case filed by a law student who was expelled in 1986 as a result of problems relating to his "obsessive infatuation with a law school classmate toward whom he made unwelcome advances."[361] In 1988, he filed a civil rights action against, among others, a state court judge who issued an injunction that banned him from school property. The district court dismissed the suit, finding the judge absolutely immune from damages for his judicial actions and the claims against the sheriff and faculty members without merit.

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[353] Nomi v. Regents for Univ. of Minn., 796 F. Supp. 412 (D. Minn. 1992).

[354] Student Press Law Center v. Alexander, 778 F. Supp. 1227 (D.D.C. 1991).

[355] *See* THE YEARBOOK OF EDUCATION LAW 1989 at 233, Smith v. Regents of Univ. of Cal., 248 Cal. Rptr. 263 (Ct. App. 1988).

[356] *See* THE YEARBOOK OF EDUCATION LAW 1992 at 204, Smith v. Regents of Univ. of Cal., 279 Cal. Rptr. 779 (Cal. 1991).

[357] Smith v. Regents of Univ. of Cal., 3 Cal. Rptr.2d 384 (Ct. App. 1992).

[358] *See* THE YEARBOOK OF EDUCATION LAW 1991 at 224, Steffan v. Cheney, 733 F. Supp. 115 (D.C. 1990); 733 F. Supp. 121 (D.C. 1990).

[359] *See* THE YEARBOOK OF EDUCATION LAW 1992 at 204, Steffan v. Cheney, 920 F.2d 74 (D.C. Cir. 1990).

[360] Steffan v. Cheney, 780 F. Supp. 1 (D.D.C. 1991).

[361] Los v. Wardell, 771 F. Supp. 266 (C.D. Ill. 1991).

A case in Texas involved litigation between a medical student and a university regarding the student's expulsion resulting from an allegation of cheating.[362] The court of appeals ordered the school to permit the student to participate in graduation proceedings, as would a student in good standing, until the completion of litigation regarding his dismissal.

Finally, an Oregon court upheld fines owed by a student for unreturned books.[363] The court ruled that the university was not precluded from collecting the debt through a setoff of funds due to the debtor from the Department of Revenue.

The Tenth Circuit Court of Appeals ruled that faculty members and officials of a state university acted outside state law when they revoked the degree of a student who plagiarized material.[364] The court found that the board of regents has sole power to confer degrees and, therefore, cannot delegate that power to revoke them.

Academic Dismissal. Several cases involved suits filed under the Federal Rehabilitation Act. One case involved the dismissal of a HIV positive dental student.[365] The court ruled that the decision was a wholly academic one based on evidence that the student could not satisfy the requirements for the degree without performing invasive procedures (which would jeopardize patients), which the school could not permit him to do. In addition, the former student did not adequately show that he was an "otherwise qualified" handicapped student under the Rehabilitation Act. In a case involving the dismissal of a dyslexic student from medical school, the court had earlier granted summary judgment for the university.[366] On appeal, the court affirmed the decision, ruling that the school produced a record that demonstrated that it fulfilled its obligation to accommodate the student.[367] In another case, the court ruled that a two-year general state personal injury statute of limitations applies to the Rehabilitation Act rather than the one-year limit under the state Disabilities Act.[368] The court also granted a motion to strike the claims for compensation and trial by jury, and deferred ruling on contractual claims until more information was provided. In a similar case in Vermont, a masters candidate who commenced work in 1976, was dropped as a candidate for the degree in 1982 because time had expired.[369] The student continued to enroll and was denied readmission in 1988. She claimed discrimination based on a handicap under both federal and state law. The court ruled that the state's three-year statute of limitations for personal injury claims is applicable to both the federal and state anti-discrimination claims. Accordingly, the court ruled that the claims were time barred. In an appeal of this decision, the appeals court affirmed the Rehabilitation Act claims but reversed and remanded to the district court the state law discrimination claim.[370] A New York court affirmed the dismissal of a case filed by a former medical student who was dismissed for poor academic performance.[371] The court ruled that the student's illness, the cause of his poor performance, was not a disability under the law.

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[362] University of Tex. Medical Sch. v. Than, 834 S.W.2d 422 (Tex. Ct. App. 1992).

[363] Letkiewicz v. University of Or., 835 P.2d 955 (Or. Ct. App. 1992).

[364] Hand v. Matchett, 957 F.2d 791 (10th Cir. 1992).

[365] Doe v. Washington Univ., 780 F. Supp. 628 (E.D. Mo. 1991).

[366] *See* The Yearbook of Education Law 1992 at 110, 182; Wynne v. Tufts Univ. Sch. of Medicine, 932 F.2d 19 (1st Cir. 1991).

[367] Wynne v. Tufts Univ. Sch. of Medicine, 976 F.2d 791 (1st Cir. 1992).

[368] Wolsky v. Eastern Va. Medical Auth., 795 F. Supp. 171 (E.D. Va. 1992).

A case in Illinois involved the dismissal of two African-American students from a university.[372] The two students later filed charges alleging the university and its officers had discriminated against them. The board of trustees and certain faculty members sought an injunction preventing an investigation of the incident by the Department of Human Rights, which the court ruled has the authority to investigate the charges.

Academic dismissal challenges in several cases examined civil rights actions under section 1983. On remand, the Hawaiian Supreme Court dismissed a civil rights claim on the grounds that the student had not clearly established due process property rights in continued enrollment in the nursing program.[373] The Supreme Court of Alabama upheld a summary judgment decision against a former nursing student who filed a suit against the university and several faculty members.[374] The court held that the student failed to prove that the decision to dismiss her was made for other than academic reasons, and that the private university did not qualify as a state actor entitling her to bring the case under section 1983. A Colorado appeals court denied *certiorari* to a former student for the same reasons.[375] In Pennsylvania, a federal district court ruled that a university was state-aided, not state-related, and was therefore not acting under color of state law as required by section 1983.[376] The Third Circuit Court of Appeals later affirmed this decision.[377]

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[369] Morse v. University of Vt., 776 F. Supp. 844 (D. Vt. 1991).
[370] Morse v. University of Vt., 973 F. 2d 122 (2d Cir. 1992).
[371] Lowinger v. State Univ. of N.Y. Health Science Center, 580 N.Y.S.2d 316 (App. Div. 1992).
[372] Board of Trustees of S. Ill. Univ. v. Department of Human Rights, 591 N.E.2d 973 (Ill. App. Ct. 1992).
[373] Soong v. University of Haw., 825 P.2d 1060 (Haw. 1992).
[374] Nelson v. University of Ala. Sys., 594 So. 2d 632 (Ala. 1992).
[375] Davis v. Regis College, Inc., 830 P.2d 1098 (Colo. Ct. App. 1991).
[376] Imperiale v. Hahnemann Univ., 776 F. Supp. 189 (E.D. Pa. 1991).
[377] Imperiale v. Hahnemann Univ., 966 F.2d 125 (3d Cir. 1992).

There was a series of cases in which the court ruled in favor of the universities in wrongful dismissal charges. In North Carolina, the court upheld the discharge of an Hispanic doctoral student.[378] It ruled that the student failed to show that the dismissal was due to racial discrimination rather than for academic reasons. Furthermore, the court dismissed the state law contract claims, ruling that the University Bulletin is not a binding contract. A Texas court reached a similar ruling where a student filed suit for receiving a failing grade.[379]

In another Texas case, a state court dismissed a suit filed by a former medical student.[380] It ruled that her dismissal was the exercise of a discretionary duty in good faith and the president and dean were protected from suit by immunity. An Iowa court found that evidence was sufficient to uphold the dismissal of a medical student for academic reasons.[381] A plaintiff who successfully prevailed in a civil rights violation in academic dismissal had, on appeal, the award of attorney fees reduced.[382] Finally, the court denied a graduate student's motion for post-trial relief from a requirement to complete a revised number of supervised experience hours.[383]

Other Constitutional Issues

In New York, college students who filed a class action suit against their county board of elections were granted permanent relief from the board's voting registration policies.[384] The students contended that since the board took the position that on-campus residences did not constitute permanent residences as defined by election laws, students living in the dormitories could not register to vote in that county. The court found that the voter registration law denying students as a class their franchise right was constitutionally impermissible.

The Colorado Court of Appeals upheld a ruling that a university's mandatory drug testing program for athletes constituted an involuntary search and was, therefore, unconstitutional under the Fourth Amendment.[385] However, they reversed the section of the lower court's injunction that banned all searches not premised on probable cause. The court stated that under different circumstances, the balance of interest could tip in favor of the defendants and, therefore, the decree should address no more than the present testing procedures.

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[378] Love v. Duke Univ., 776 F. Supp. 1070 (M.D.N.C. 1991).

[379] Tobias v. University of Tex., 824 S.W.2d 201 (Tex. Ct. App. 1991).

[380] Lazaro v. University of Tex. Health Science Center, 830 S.W.2d 330 (Tex. Ct. App. 1992).

[381] Lunde v. Iowa Bd. of Regents, 487 N.W.2d 357 (Iowa Ct. App. 1992).

[382] Lipsett v. Blanco, 975 F.2d 934 (1st Cir. 1992).

[383] Crabtree v. California Univ. of Pa., 606 A.2d 1239 (Pa. Commw. Ct. 1990).

[384] Levy v. Scranton, 780 F. Supp. 897 (N.D.N.Y. 1991).

[385] Derdeyn v. University of Colo., 832 P.2d 1031 (Colo. Ct. App. 1991).

A group of students who challenged their university's use of their social security numbers as identification were granted a preliminary injunction.[386] The court ruled that the university and its president were not subject to the Privacy Act, under FERPA, and that the students had demonstrated that the practice could cause irreparable harm. The court enjoined the university from allowing unprotected distribution of class rosters containing social security numbers and students' names.

In another privacy-related case, a court dismissed the case of a former student who sued his university for releasing his transcript to the United States Attorney's Office without proper notification.[387] The student, convicted of drug charges, alleged that this action was a violation of FERPA and that his conviction was a direct result of the university's failure to notify him of the release of his record. The court dismissed the case because a private right of action under FERPA is not available.

Finally, in a case where a student was charged with the theft of university property, the Court of Appeals of Utah reversed a decision to suppress evidence obtained in a warrantless search of his dormitory room.[388] The court held that the search was reasonable since it was undertaken to protect the university's interest in maintaining a safe and proper educational environment, as well as to fulfill the requirements of the housing contract. The matter was remanded to the trial court.

Federal Statutes

The court of appeals ruled that a deaf law student was eligible for assistance from the Office of Vocational Rehabilitation based on his disability.[389] The Office had previously found him capable of employment in several fields and, therefore, ineligible for vocational rehabilitation services.

Liability

Personal Injury

Extensive litigation involving personal injury was found again this year. These cases are divided into several issues including liability for bodily injury, wrongful death, negligence, alcohol consumption, hazing, duty to warn, rape, defamation, jurisdictional questions, and damage awards. In one case, liability was apportioned equally between a student and an instructor of a swimming class. The student was injured while attempting a dive. The court gave equal responsibility to the student, who is the best judge of what she can do safely, and the instructor, who while cautioning the student, did not stop her from attempting the dive.[390]

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[386] Krebs v. Rutgers, 797 F. Supp. 1246 (D.N.J. 1992).

[387] Francois v. University of D.C., 788 F. Supp. 31 (D.D.C. 1992).

[388] State v. Hunter, 831 P.2d 1033 (Utah Ct. App. 1992).

[389] Indiana Dep't of Human Serv. v. Firth, 590 N.E.2d 154 (Ind. Ct. App. 1992).

Several cases involved the death of a student or university hospital patient. In the wrongful death of a hospital patient, the coexecutor of the estate brought action against the university medical school. A North Carolina court ruled that such action was not allowed against a constituent institution of the state.[391] In the death through cardiac arrest of a member of the private college lacrosse team, the court found that the institution had taken the appropriate care in having athletic trainers on hand during practice, when neither the trainer nor the coach had training in CPR.[392] In another case, the court found that the police officer violated an intoxicated arrestee student's civil rights, when the officer failed to follow the procedures of removing all items of danger.[393] The student hung himself in the holding cell.

Hazing by clubs and fraternities was at issue when injury resulted. The father of a deceased lacrosse club initiate brought suit after the death of his son from alcohol poisoning. After the local court dismissed the case, on appeal, the appellate court remanded the case for trial.[394] The court found that the lacrosse club, highly valued by students at the college, had a *de facto* requirement of drinking during initiation. Furthermore, one member had breached a voluntary duty to the deceased when he allowed him to be carried to his room for the night and periodically stopped in to check on him but did nothing when he heard him gurgling. A court denied a fraternity's motion for summary judgment in a case involving the hazing death of a pledge who had a heart attack during a mandatory pledge run.[395]

In a case involving a suit against a minor for serving alcoholic beverages to another minor, a Pennsylvania court ruled that an underage person cannot come under the liability of a social host serving alcohol to another minor.[396] The issue surrounded a case where an individual with the couple during the evening, took the female to an isolated area where he stabbed her to death. Several members of a fraternity were charged with sexually assaulting an intoxicated sorority member during an exchange night. From the testimony of various witnesses and because the girl waited six days after the incident to report it, making it impossible to verify that a sexual assault had taken place, the court found the evidence unable to support a sexual assault charge but did support a charge of battery.[397]

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[390] Don Vito v. State, 582 N.Y.S.2d 872 (App. Div. 1992).

[391] Jones v. Pitt County Memorial Hosp., Inc., 410 S.E.2d 513 (N.C. Ct. App. 1991).

[392] Kleinknecht v. Gettysburg College, 786 F. Supp. 449 (M.D. Pa. 1992).

[393] Hickey v. Zezulka, 487 N.W.2d 106 (Mich. 1992).

[394] Haben v. Anderson, 597 N.E.2d 655 (Ill. App. Ct. 1992).

[395] Thomas v. Lamar Univ.—Beaumont, 830 S.W.2d 217 (Tex. Ct. App. 1992).

[396] Goldberg v. Delta Tau Delta, 609 A.2d 535 (Pa. Super. Ct. 1992), *aff'd*, 613 A.2d 1250 (Pa. Super. Ct. 1992).

Female students sought to recover for sexual assault in their dormitory rooms. In the case of a private college, the court found that the college did not have a duty to protect a student from rape committed by a third party.[398] A "peeping tom," burglaries, and theft did not heighten the college's duty to protect students from rape according to the Georgia court. However, a New York court found that the university had a duty to provide a raped student with minimal security in the dormitory.[399] The court also noted that the actual owner of the building, the New York Dormitory Authority, was not the landlord for liability purposes. The institution at which the dorm was located was the landlord.

In another New York case, collateral estoppel prohibited the plaintiff's claim against the dormitory authority when damages had already been awarded against the institution at trial.[400] Charges were dismissed against a college when a motorcyclist's family brought a claim of wrongful death.[401] The motorcyclist entered properly posted land which served as a wildlife refuge, and collided with a cable gate dividing the wildlife management area from the refuge. In a New York case, a private college was found without a duty or negligence when, at the beginning of the fall semester, a student became ill for a short time, refused to seek available medical assistance, and died.[402]

Several cases involved the level of duty of a particular organization in personal injury cases. In one case, the court found that the fraternity could not be held liable for injury incurred during a fight between members of two fraternities.[403] In a sledding incident in which some Louisiana students were injured when their sled crashed into a light pole, the court found that the institution either had a duty to protect them from injury or a duty to warn them of potential risk of injury.[404] A university in Alaska was found to have a duty from the propensity of a ski hill to propel sledders into some trees.[405]

The institution's duty to protect people from slippery conditions on the campus was also litigated. In a case involving a slip and fall on a wheelchair access ramp between a street and a sidewalk, the institution had no reason to know that sand would be on the ramp when it had

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397. Wilson v. Bellamy, 414 S.E.2d 347 (N.C. Ct. App. 1992).
398. Savannah College of Art and Design, Inc. v. Roe, 409 S.E.2d 848 (Ga. 1991).
399. Green v. Dormitory Auth. of the State, 577 N.Y.S.2d 675 (App. Div. 1991).
400. Bell v. New York State Dormitory Auth., 584 N.Y.S.2d 3 (App. Div. 1992).
401. Trammell v. Baird, 413 S.E.2d 445 (Ga. 1992).
402. Wells v. Bard College, 584 N.Y.S.2d 565 (App. Div. 1992).
403. Rothman v. Gamma Alpha Chapter, 599 So. 2d 9 (Ala. 1992).
404. Pitre v. Louisiana Tech Univ., 596 So. 2d 1324 (La. Ct. App. 1992).
405. University of Alaska v. Shanti-Alaska, 835 P.2d 1225 (Alaska 1992).

never been there before.[406] In another slip and fall in a cafeteria, the court found that immunity of public buildings did not extend to negligent janitorial care.[407] An injured Ohio student was found to be contributorily negligent in a fall on icy steps outside the dining hall.[408] The dean of a divinity school, rather than the divinity school, was liable for the dean's dog biting a student.[409] A summary judgment was denied to the university for a student injured on a defective tennis court the student was required to play on to maintain her scholarship.[410] A local community college had immunity from suit against its student nurse's alleged injury to a hospital patient.[411]

Several cases involved the disease AIDS. In Pennsylvania, the court found that the hospital had the right to disclose the disease (AIDS) of a physician in residence to patients involved in surgical procedures performed by the resident.[412] In another case, a hemophiliac who acquired AIDS through blood products attempted to join the physician and university hospital in the suit for product liability against the manufacturer of the blood products used.[413] The court allowed the joining of these new parties.

Several other cases involved a variety of claims. A Massachusetts court dismissed a civil rights claim brought by a black man who was beaten by a mob after the World Series in 1986.[414] The court found that the university and local police treated all involved in the mob equally. A California court terminated litigation after an out-of-court settlement was reached between a California university and the man it defamed by attributing the death of his cattle to his negligence.[415] Another court found that the city police had probable cause to arrest a parking violator for theft when he was observed removing an immobilizing device from his car, and a device placed on his car parked in the same lot had previously disappeared.[416] A university health center was negligent in informing a student patient of a tumor found in an exam at a local hospital and reported to the health center.[417]

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[406] Zuppardo v. State, 588 N.Y.S.2d 401 (App. Div. 1992).

[407] McLean v. University of Mich. Medical Ctr., 480 N.W.2d 602 (Mich. Ct. App. 1991).

[408] Newman v. Ohio State Univ., 594 N.E.2d 173 (Ohio Ct. Cl. 1991).

[409] Post v. Annand, 798 F. Supp. 189 (S.D.N.Y. 1992).

[410] Conolly v. St. John's Univ., 575 N.Y.S.2d 68 (App. Div. 1991).

[411] Community College of Allegheny County v. Seibert, 601 A.2d 1348 (Pa. Commw. Ct. 1992).

[412] *In re* Milton S. Hershey Medical Ctr., 595 A.2d 1290 (Pa. 1991).

[413] Doe v. Cutter Biological, 774 F. Supp. 1001 (E.D. La. 1991).

[414] Robinson v. Commonwealth, 584 N.E.2d 636 (Mass. App. Ct. 1992).

[415] Neary v. Regents of Univ. of Cal., 10 Cal. Rptr.2d 859 (Cal. 1992); *see* The Yearbook of School Law 1987 at 271, Neary v. Regents of Univ. of Cal., 230 Cal. Rptr. 281 (Ct. App. 1986).

[416] Thyen v. McKee, 584 N.E.2d 23 (Ohio Ct. App. 1990).

[417] Caracci v. State, 577 N.Y.S.2d 925 (App. Div. 1991).

Jurisdictional and damage award questions were before the courts in the following cases. A Pennsylvania court ruled that Temple University, a state-related institution, was not an instrumentality of the state, and thus immune from personal injury claims.[418] The three-year statute of limitations had expired in a North Dakota case involving a fall on ice four years prior to filing the complaint.[419] Finally, prejudgment interest on damage awards was denied in two cases.[420]

Workers' Compensation

Workers' compensation for on the job injuries was before the courts in several ways. Issues surround questions of judicial review, tolling, employer negligence, compensable injuries, benefits available, and the award of attorney fees in these types of cases.

Judicial review of compensation board decisions was before the courts in several cases. An Illinois court upheld a workers' compensation commission award as being based on the evidence.[421] In Michigan, a court found that a decision to deny disability for Chronic Fatigue Syndrome, based on an examination by a physician of the institution, denied the worker of an impartial decision.[422] The court noted it had authority over judicial review of administrative agency decisions. In another case, the court denied summary judgment to an institution when the institution based its request on an injury that was time barred, and had attempted to link it to a second injury which was not time barred.[423]

Several cases involved employer negligence resulting in injury and a workers' compensation award. An Alabama court found that the institution was negligent in its maintenance of a campus police car, where a patrolling officer was injured when the car door flew open.[424] In Florida, a court affirmed a decision that stress was not the cause of the aggravation of the worker's preexistent multiple sclerosis.[425] In an Arizona case, the court found that a woman's workers' compensation claim was not untimely because, based on medical exams, she had no way of knowing that the injury was more serious than first diagnosed.[426] A worker exposed to chemicals was awarded expenses of psychological treatment, but not chemical sensitivity syndrome, by the trial court. On appeal, a Louisiana court ruled that expenses for the chemical syndrome treatment could not be added by subsequent trial court order.[427] A worker's fatal heart attack in his home two weeks after he was discharged from work was not an occurrence in the course of employment for workers' compensation purposes.[428]

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[418] Doughty v. City of Philadelphia, 596 A.2d 1187 (Pa. Commw. Ct. 1991).

[419] Olson v. University of N.D., 488 N.W.2d 386 (N.D. 1992).

[420] University of Tex. v. Hinton, 822 S.W.2d 197 (Tex. Ct. App. 1991); Moore v. University of Cincinnati Hosp., 586 N.E.2d 213 (Ohio Ct. App. 1990).

[421] University of Ill. v. Industrial Comm'n of Ill., 596 N.E.2d 823 (Ill. App. Ct. 1992).

[422] Guiles v. University of Mich. Bd. of Regents, 483 N.W.2d 637 (Mich. Ct. App. 1992).

[423] Johnson v. University of Cincinnati, 587 N.E.2d 469 (Ohio Ct. App. 1991).

[424] Moore v. Reeves, 589 So. 2d 173 (Ala. 1991).

[425] University of Fla. v. Massie, 602 So. 2d 516 (Fla. 1992).

[426] Saylor v. Industrial Comm'n of Ariz., 831 P.2d 847 (Ariz. Ct. App. 1992).

The amount of benefits was at issue in several litigations. A Florida court ruled that social security could not be deducted from the workers' compensation award.[429] In another Florida case, the judge remanded the case because a claim for benefits to travel for treatment was not specific enough.[430] In Alaska, a court found it was error not to apply medical expenses of chiropractic care for a worker's back injury.[431] A Colorado court refused to allow a trade assistance fund for training programs to be used for law school tuition.[432]

Several cases involved the determination of the amount of attorney fees. Attorney fees are awarded based on the amount of benefits. In one case, the question was whether past benefit awards were in jeopardy, which would affect the amount of the attorney fees. The state appellate court found that past benefits were not in jeopardy making the attorney fee award excessive. However, on appeal, the state supreme court ruled that past benefits were in jeopardy, approving the original award.[433]

Contract Liability

The question of the date of substantial completion of a faulty construction project was before the court, which determined that the statute of limitations had lapsed preventing the university's suit.[434] In a contract dispute between a gas company and a university, the contract lapsed when they failed to arrive at a mutually agreed upon price, not when the term of the contract expired.[435] A company's breach of contract claim against a state university entitled them to a trial.[436] A subcontractor, attempting to collect for extra work given to a general contractor, was prohibited from attaching a lien on the contract because the subcontract prohibited the use of liens.[437] An Arkansas court refused to apply the statute of limitations to a bill for services owed by a patient to a hospital. The reason given was that no information as to dates of last billing or payment precluded a finding that the statute of limitations tolled from the date of service.[438] Finally, the statute of limitations began tolling on the date the subcontractor realized it would not be compensated, making the contract default claim timely.[439]

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[427] Dobbs v. Board of Supervisors of La. State Univ., 588 So. 2d 764 (La. Ct. App. 1991).

[428] *In re* Larocque, 582 N.E.2d 959 (Mass. App. Ct. 1991).

[429] University Medical Ctr. v. Sumpter, 591 So. 2d 288 (Fla. Dist. Ct. App. 1991).

[430] University of Cent. Fla. v. Gleaves, 586 So. 2d 458 (Fla. Dist. Ct. App. 1991).

[431] Adamson v. University of Alaska, 819 P.2d 886 (Alaska 1991).

[432] Movitz v. Division of Employment and Training, 820 P.2d 1153 (Colo. Ct. App. 1991).

[433] Highlands Univ. v. Baca, 824 P.2d 315 (N.M. Ct. App. 1991), *rev'd*, Baca v. Highlands Univ., 824 P.2d 310 (N.M. 1992).

[434] Trustees of Columbia Univ. v. Gwathmey Siegel and Assoc. Architects, 574 N.Y.S.2d 668 (App. Div. 1991).

[435] Rutgers v. Martins Woodlands Gas Co., 974 F.2d 659 (5th Cir. 1992).

[436] Crochet Equip. Co. v. Board of Supervisors of La. State Univ., 597 So. 2d 562 (La. Ct. App. 1992).

Insurance contracts were also at issue. An Illinois university entered an insurance contract, which began at the start of the next fiscal year, but contained a stub to cover the time before the new fiscal year commenced. At issue was the $5 million limit on the occurrence policy and whether the limit covered both the stub and the fiscal year period or had separate limits for each. The court ruled that the university, under state law, was entitled to reformation of the policy to clarify the coverage limit.[440] An ice show insurer and the university field house insurer were responsible for injury which occurred on egress after the ice show.[441] A state university had no claim against its insurer when the claim was settled and paid by the state, a separate entity.[442]

In a case before the Louisiana courts earlier,[443] the State Supreme Court ruled that the university had not borrowed a private automobile when a student used his private car to run an errand for a university faculty member.[444] A question of whether the university's employee insurance was integrated and available to a contracting food service employee resulted in the court's denial of a summary judgment to a university.[445] An Illinois university successfully brought a breach of contract claim against an insurance company, which claimed various exclusions in the contract exempted it from paying an employment related settlement claim. The comaker of a student loan was liable for the loan when the borrower declared bankruptcy.[446]

Bidding procedures and questions were in the courts again. An unsuccessful bidder challenged the closed board meeting to evaluate the successful bidder's competence.[447] Another unsuccessful bidder's suit was moot when on the second bidding round he was awarded the bid.[448] In another case, the court ruled that the university had an obligation to re-bid a job when it announced it would, but then awarded a contract to one of the first bidders.[449] The fact that work on the project was almost complete barred remedy through the doctrine of laches.

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[437] Ramco Indus. v. Board of Trustees of Univ. of Ill., 589 N.E.2d 672 (Ill. App. Ct. 1992).

[438] University Hosp. of Ark. v. Undernehr, 821 S.W.2d 26 (Ark. 1991).

[439] MBA Commercial Constr. v. Roy J. Hannaford Co., 818 P.2d 469 (Okla. 1991).

[440] Board of Trustees of Univ. of Ill. v. Insurance Corp. of Ir., 969 F.2d 329 (7th Cir. 1992); *see* THE YEARBOOK OF EDUCATION LAW 1992 at 218, Board of Trustees of Univ. of Ill. v. Insurance Corp. of Ir., 750 F. Supp. 1375 (N.D. Ill. 1990).

[441] Lacorte Elec. Constr. & Maintenance, Inc. v. County of Rensselaer, 576 N.Y.S.2d 397 (App. Div. 1991).

[442] State v. Continental Casualty Co., 829 P.2d 528 (Idaho 1992).

[443] *See* THE YEARBOOK OF EDUCATION LAW 1992 at 218, Schroeder v. Board of Supervisors of La. State Univ., 577 So. 2d 1074 (La. Ct. App. 1991).

[444] Schroeder v. Board of Supervisors of La. State Univ., 591 So. 2d 342 (La. 1991).

[445] Howard Univ. v. Good Food Serv., Inc., 608 A.2d 116 (D.C. 1992).

[446] Ohio Student Loan Comm'n v. Rodner, 588 N.E.2d 304 (Ohio Ct. App. 1991).

Several cases dealt with the failure of contractors or subcontractors to pay the prevailing wages. A New York court found that a contractor underpaid workers.[450] In another New York case, a subcontractor was found in violation of the prevailing wage rate.[451] An Ohio company attempted to sue a university for failing in its statutory duty to determine for the company the prevailing wage.[452] The court found no private right of action existed against the statutory duty of a public authority.

Several cases involved contract disputes between university researchers and the institution at which they were employed. In a professor's suit for breach of contract and fiduciary duty, the court found the royalty agreement to be too vague to be enforceable.[453] Another case involved a challenge on First Amendment grounds of a confidentiality clause in a National Institute of Health research contract requiring the researcher to get permission before publishing research findings.[454] The court found the clause unconstitutional. Several contract cases involved injuries to laborers working on equipment or construction projects completed by other contractors.[455]

Deceptive Practices

A number of cases were brought over the deceptive practices of various institutions. The institutions in these cases are primarily proprietary schools. For example, the purchaser of a proprietary school was not liable for the deceptive practice claims against the previous owner.[456] An Ohio appellate court found that the student had presented valid claims of breach of contract and misrepresentation against a paralegal school and ordered the case remanded for trial.[457] Students in the District of Columbia sued for declaratory and injunctive relief in an action against lenders and guarantors of student loans and the Secretary of Education for approving loans to a fraudulent proprietary school.[458] The court found that, under the consumer lending laws, the plaintiff had a valid claim against the lender and the guarantor but that there was no private right of action under the Higher Education Act against the Secretary of Education.

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[447] Building & Constr. Trades Council v. Nevada *ex rel.* Pub. Works Bd., 836 P.2d 633 (Nev. 1992).

[448] James A. Keller, Inc. v. Flaherty, 600 N.E.2d 736 (Ohio Ct. App. 1991).

[449] Building & Constr. Trades Council v. Nevada *ex rel.* Pub. Works, 836 P.2d 633 (Nev. 1992).

[450] RSI Roofing, Inc. v. Hartnett, 576 N.Y.S.2d 645 (App. Div. 1991).

[451] Sierra Telcom Servs. Inc. v. Hartnett, 579 N.Y.S.2d 753 (App. Div. 1992).

[452] Robbins Sound, Inc. v. Ohio Univ., 590 N.E.2d 877 (Ohio Ct. App. 1990).

[453] Hsu v. Vet-A-Mix, Inc., 479 N.W.2d 336 (Iowa Ct. App. 1991).

[454] Board of Trustees of Leland Stanford Junior Univ. v. Sullivan, 773 F. Supp. 472 (D.D.C. 1991).

[455] Miccio v. Skidmore College, 581 N.Y.S.2d 108 (App. Div. 1992); Fitzgibbons v. New York State Univ. Constr. Fund, 578 N.Y.S.2d 317 (App. Div. 1991); Taake v. WHGK, Inc., 592 N.E.2d 1159 (Ill. Ct. App. 1992).

[456] Erdy v. Columbus Paraprofessional Inst., 599 N.E.2d 338 (Ohio Ct. App. 1991).

There was no breach of contract when a clerical/computer graduate of a proprietary business school was unable to land a job in the field.[459] The school promised that students would have the minimum skills for jobs in this field but never promised jobs. Finally, a court ruled that a proprietary school was involved in deceptive practices when it misrepresented the quality of its teachers, equipment, and training aids in its catalogue.[460] The court appropriately awarded the student damages for misrepresentation and mental anguish.

Negligence

Plaintiffs brought charges of negligence for behavior while they were under the care or authority of professionals or institutions. Cases involved issues of jurisdiction, negligence in medical treatment at university medical facilities, university negligence in failing to supervise or warn, and negligence of individual institutional employees.

Jurisdictional and procedural questions involved such things as immunity and requests for summary judgment. In Montana, the court denied summary judgment to the institution where a student was injured in a slip and fall on some stairs in a building.[461] Issues remained to determine whether the institution and its employees were negligent in the maintenance of the stairway. In Georgia, the court found that while sovereign immunity applied to the board of regents of the university hospital, it did not apply to doctors in the university's employ, where a constitutional provision waived immunity for negligent claims when liability insurance coverage existed.[462]

Other cases involved negligent patient care in university-operated medical facilities. In one case, the court annulled the disciplinary action taken by a medical review board against a resident and an intern at a university hospital. At issue was a patient who came into the hospital complaining of a fever and earache from a tooth extraction and died shortly after admission. The court held that the misdiagnosis was reasonable given the symptoms and did not amount to gross negligence.[463] However, a hospital staff were found negligent in failing to post a notice that the patient they were treating had a contagious disease, AIDS.[464] A police officer was bitten when he attempted to assist medical staff with a violent patient. The court found that while the officer had not contracted the disease, he had suffered from stress and mental anguish. In another AIDS case, a three-year-old child acquired the disease from a blood transfusion during heart surgery in 1983 and later died. The court found that at that time, the blood company and the university hospital followed reasonable procedures.[465]

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[457] Malone v. Academy of Court Reporting, 582 N.E.2d 54 (Ohio Ct. App. 1990).
[458] Jackson v. Culinary Sch. of Wash., 788 F. Supp. 1233 (D.D.C. 1992).
[459] Blane v. Alabama Commercial College, Inc., 585 So. 2d 866 (Ala. 1991).
[460] American Commercial Colleges, Inc. v. Davis, 821 S.W.2d 450 (Tex. Ct. App. 1991).
[461] Moffatt v. University of Mont., 837 P.2d 401 (Mont. 1992).
[462] Wilson v. Board of Regents, 419 S.E.2d 916 (Ga. 1992).

Several cases involved charges of negligent supervision on the part of a college or university. A West Virginia private college does not stand *in loco parentis* with its students.[466] The institution was not negligent when a seventeen-year-old female freshmen went across the street from the campus to a popular tavern hangout, met two men (nonstudents), illegally consumed alcohol, and was taken to the men's residence where she was sexually assaulted. An Ohio university was not liable for the injuries a student received while attending a university sponsored party.[467] The student went to a nearby river to swim, and broke his neck while diving into the river. In Texas, a case involving a rape in a university dormitory continues to be the subject of a series of motions.[468] The case involves a female resident of a dorm who repeatedly, with others, complained about a broken door lock which the university failed to repair. The court ruled that this claim was not barred by intentional tort exception to waiver of state sovereign immunity. A fall of a student from a catwalk while working in a theater during rehearsal for a play, was not exempted from prosecution by the state's public building statute which only covers public areas. The court found that the catwalk was not a public area.[469] In New York, the plaintiffs were entitled to discovery in a claim involving negligence when over a three-year-period, the university continued to allow students in a dormitory to throw incendiary devices onto the roof of another building.[470]

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[463] Stone v. Sobol, 575 N.Y.S.2d 939 (App. Div. 1991).

[464] Johnson v. West Virginia Univ. Hosps., Inc., 413 S.E.2d 889 (W. Va. 1991).

[465] Osborn v. Irwin Memorial Blood Bank, 7 Cal. Rptr.2d 101 (Cal. Ct. App. 1992).

[466] Hartman v. Bethany College, 778 F. Supp. 286 (N.D.W. Va. 1991).

[467] Fisher v. Ohio Univ., 589 N.E.2d 13 (Ohio 1992).

[468] Delaney v. University of Houston, 835 S.W.2d 56 (Tex. 1992); *see* THE YEARBOOK OF EDUCATION LAW 1991 at 239, 792 S.W.2d 733 (Tex. Ct. App. 1990).

[469] Putman v. Wayne County Community College, 473 N.W.2d 711 (Mich. Ct. App. 1991).

[470] Freeman v. Hertzoff, 577 N.Y.S.2d 839 (App. Div. 1992).

Finally, two cases involved charges of negligent supervision by university employees. In one case, the court dismissed the negligent charges against a coach and the institution but not the charges against the player.[471] The soccer player had come up behind an opponent, tripped him, and kneed him in the jaw, breaking his jaw. A safety inspector was not found negligent when a science professor's hand received high doses of radiation from an irradiation apparatus from which he had removed the safety devices and was operating illegally, with neither the inspector's nor the university's knowledge.[472]

Medical Malpractice

This year, jurisdictional questions, immunity, tolling, actual malpractice charges, and procedural motions were involved in malpractice litigation. For example, in two cases, the courts ruled that they lacked jurisdiction in malpractice cases against constituents of the state: public university hospitals.[473] In another case filed prior to a new law giving an insurance waiver to sovereign immunity, the suit was barred by sovereign immunity.[474] Several cases were barred by the statute of limitations on filing a claim.[475]

A number of cases involved malpractice suits surrounding either diagnosis or treatment. Failure to see a lump on a patient's neck (which was thyroid cancer) resulting in the death of the patient was not malpractice.[476] Birth-related neurological injuries come under the neurological injury compensation plan of Florida.[477] The ophthalmological misdiagnosis of a premature baby on oxygen, which resulted in visual impairment, was immune from liability under malpractice.[478] A diagnosis as mononucleosis instead of an intracerebral abscess causing the patient's death, was reasonable given the symptoms the patient presented when coming into the emergency room.[479] A patient failed to establish a case for medical malpractice in her alleged early discharge from the hospital after the birth of twins.[480]

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471. Brown v. Day, 588 N.E.2d 973 (Ohio Ct. App. 1990).
472. Jaworowski v. Medical Radiation Consultants, 594 N.E.2d 9 (Ohio Ct. App. 1991).
473. Kiersch v. Ogena, 595 N.E.2d 696 (Ill. App. Ct. 1992); Jones v. Pitt County Memorial Hosp., Inc., 410 S.E.2d 513 (N.C. Ct. App. 1991).
474. Curtis v. Board of Regents of the Univ. Sys. of Ga., 416 S.E.2d 510 (Ga. 1992).
475. Brown v. Teitelbaum, 830 P.2d 1081 (Colo. Ct. App. 1991); Miller v. Guze, 820 S.W.2d 576 (Mo. Ct. App. 1991); Raethke v. Oregon Health Sciences Univ., 837 P.2d 977 (Or. Ct. App. 1992).
476. Street v. Hedgepath, 607 A.2d 1238 (D.C. 1992).
477. University of Miami v. Klein, 603 So. 2d 651 (Fla. Dist. Ct. App. 1992).
478. Klein v. Boyle, 776 F. Supp. 285 (W.D. Va. 1991).
479. Sciarabba v. State, 581 N.Y.S.2d 491 (N.Y. 1992).
480. Thomas v. University of Chicago Lying-In Hosp., 583 N.E.2d 73 (Ill. App. Ct. 1991).

Finally, a case involved a charge of malpractice where a psychologist, allegedly after treatment had ended, entered into a homosexual relationship with her client.[481] In a federal rules decision, measures were ordered to control discovery in an effort to protect the psychologist from damage, but harm did not reach the level to issue a gag order. The discovery would limit the plaintiff's contact with the pyschologist's patients to a very short list of those known to have pertinent information.

Educational Malpractice

The courts continue to be unwilling to reach a finding of educational malpractice. Pennsylvania plaintiffs filed an educational malpractice claim against a court reporting school. The claim was based on misrepresentations in the catalog and poor quality equipment and instruction.[482] The court found that no cause of action existed under educational malpractice.

Antitrust Law

In a case involving anti-trust violations of several universities in the setting of tuition and fees, the court ruled that the attorney representing the class was unqualified to argue this case.[483] The court cited a number of actions by courts against the attorney for unprofessional behavior. In another fee and tuition setting case, the court denied a motion by a Massachusetts institution to change the venue to Massachusetts.[484] After settlement between the federal government and the other institutions involved in the same case, the Massachusetts institution failed to show it would be inconvenienced by the case remaining in the Eastern Pennsylvania District.

Copyright Law

The Second Circuit Court of Appeals upheld a lower court ruling that the terms and concepts used in a book were neither sufficiently original nor contained a minimal degree of creativity to make it copyrightable.[485] In another case, the court found that the use of attributed ideas and concepts of a writer was not copyright infringement when actual quotes from letters and journals were not use.[486]

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[481] Stamy v. Packer, 138 F.R.D. 412 (D.N.J. 1990).
[482] Cavaliere v. Duff's Business Inst., 605 A.2d 397 (Pa. Super. Ct. 1992).
[483] Kingsepp v. Wesleyan Univ., 142 F.R.D. 597 (S.D.N.Y. 1992).
[484] United States v. Brown Univ., 772 F. Supp. 241 (E.D. Pa. 1991).
[485] Arica Inst. v. Palmer, 970 F.2d 1067 (2d Cir. 1992).
[486] Wright v. Warner Books, Inc., 953 F.2d 731 (2d Cir. 1991).

Finally, a number of suits involved patent infringement.[487] Involved in this series of cases are the University of California and Eli Lilly and Company in a dispute over recombinant DNA technology and the microorganisms used in making insulin. The United States District Court of Northern California allowed the plaintiff and defendant to amend their complaints.[488] The Federal Circuit of the United States Court of Appeals found it proper to coordinate the several cases and transfer them to Indiana for adjudication on the issues.[489]

Estates and Wills

Several cases involved the interpretation of the will of a donor to the university. One action was an attempt by several beneficiaries to prevent the executor of the estate from selling land with the proceeds going to the contingent beneficiary.[490] The court found that the woman clearly intended that her property become a public park or be used by the contingent beneficiary, the university, to preserve the natural environment. Under a Kansas doctrine of *cy pres*, funds given to a now defunct college to award scholarships for nursing education could be changed to a foundation which awards scholarship for the same purposes for students at other colleges.[491] In the case of a bankrupt college under chapter 11, the court abstained from proceeding until the estate of an Iowa donor could be probated.[492] Finally, a Virginia court found that the testator of a will intended that the estate pay the appropriate estate taxes rather than have them apportioned to each benefactor, an option provided by law.[493]

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487. *See* THE YEARBOOK OF EDUCATION LAW 1991 at 220, Regents of the Univ. of Cal. v. Eli Lilly & Co., 734 F. Supp. 911 (N.D. Cal. 1990).
488. Regents of the Univ. of Cal. v. Eli Lilly & Co., 777 F. Supp. 779 (N.D. Cal. 1991).
489. *In re* Regents of Univ. of Cal., 964 F.2d 1128 (Fed. Cir. 1992).
490. Board of Regents v. Bates, 418 S.E.2d 8 (Ga. 1992).
491. *In re* Crawshaw, 819 P.2d 613 (Kan. 1991).
492. *In re* Tarkio College, 137 B.R. 34 (W.D. Mo. 1992).
493. Lynchburg College v. Central Fidelity Bank, 410 S.E.2d 617 (Va. 1991).

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Introduction

This chapter is new to the *Yearbook* and includes cases where neither party is an educational institution, faculty member, administrator, staff, or student. Although the cases included in this chapter are not "education" cases, each has an application to either early childhood, K-12, or higher education law. Additionally, each case included within this chapter has been, or will be, reviewed by the United States Supreme Court. The chapter was added to help ensure the inclusion of all relevant case law in the *Yearbook*.

First Amendment

The right of persons to free speech, press, expression, and the right to assemble are guaranteed under the First Amendment of the United States Constitution. To that end, these rights are frequently challenged, interpreted, and affirmed within the judicial system. Among the myriad related cases published over the last year, eleven of those reviewed or accepted to be heard by the Supreme Court are included in this section.

Freedom of Speech

The following cases examine varying components of the free speech issue and are particularly relevant when looking at free speech and commercial solicitation on college campuses.

The Port Authority of New York adopted a regulation forbidding the repetitive solicitation of money within airport terminals, although solicitation continued to be permitted in the sidewalk area outside the terminal buildings. The International Society of Krishna Consciousness, whose members used the airport terminals for solicitation of money, sought declaratory and injunctive relief under section 1983 based on a denial of rights guaranteed under the First Amendment. In upholding the regulation forbidding the repetitive solicitation of money, the Supreme Court designated an airport terminal operated by a public authority as a nonpublic forum.[1] Although many airport terminals have expanded their functions beyond those directly involved with efficient air travel, these terminals have not traditionally had a principal purpose of promoting the free exchange of ideas. Furthermore, the type of solicitation practiced in airport terminals prior to the implementation of the regulation was at times disruptive to the primary purposes of the terminal.

In an associated case, the Port Authority of New York adopted a regulation forbidding the repetitive sale or distribution of printed or written material including flyers, brochures, pamphlets, etc., within the airport terminals. Once again, the regulated activities continued to be permitted in the sidewalk areas outside the terminals. The International Society for Krishna Consciousness, whose members wished to perform the ritual of publicly distributing religious literature, sought declaratory and injunctive relief claiming a violation of the First Amendment.

In contrast to the previous case, the Supreme Court held that the regulation adopted by the Port Authority banning the distribution of literature was invalid under the free speech guarantee of the First Amendment.[2] The majority held the regulation to be unreasonable, in part, because there was no explanation presented as to how "peaceful pamphleteering" was incompatible with the airport terminal environment. The minority disagreed and proposed that the ban on distribution was no less reasonable than the ban on solicitation for money and that to uphold one and forbid the other will prove burdensome to Port Authorities.

Equally important to upholding the First Amendment are the free speech rights of individuals. A Nevada attorney, who was representing a client suspected in the theft of cocaine and traveler's checks from a company vault, held a press conference hours after his client was indicted on the theft charges. During the press conference, the attorney gave an opening statement in which he alleged his client's innocence and placed accusations for the crime on a police detective. Six months later the client was acquitted of the crime, and subsequently, the State Bar of Nevada alleged that the attorney had violated a rule established by the Supreme Court of Nevada prohibiting lawyers from making extrajudicial statements to the press. The rule was intended to restrict statements that may prejudice a judicial proceeding, but it included a "safe harbour" provision to permit a lawyer to state the general nature of a defense. On *certiorari*, the United States Supreme Court held that the

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[1] International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701 (1992).

[2] Lee v. International Soc'y for Krishna Consciousness, Inc., 112 S. Ct. 2709 (1992).

Nevada rule satisfied the requirements of the First Amendment, although the interpretation of the rule provided by the Nevada Supreme Court was found vague and additional clarification was needed.[3]

Free speech was also an issue as it pertained to the proximity of literature to a polling place. A challenge was brought by a city council candidate's campaign treasurer against a Tennessee statute that prohibited solicitation of votes and display or distribution of campaign literature within 100 feet of the entrance to a polling place. The treasurer claimed that the statute was a violation of both First Amendment free speech rights and Fourteenth Amendment equal protection rights. In a divided opinion, the Court held that the Tennessee statute was not in violation of the Constitution given that the 100-foot campaign-free zone served a compelling state interest.[4] A zone of some size was found necessary to prevent voter intimidation and election fraud not satisfactorily protected by other laws. Accordingly, a boundary of 100 feet was not considered to be an impermissible burden on free speech rights, while the limited geographic restriction provided in the statute was not an impingement on constitutionally protected rights under the Fourteenth Amendment.

A related case dealt with free speech issues relevant to voting and elections. A provision in the California Constitution prohibiting a political party or party central committee from endorsing, supporting, or opposing a candidate for nonpartisan office was challenged as being in violation of the First Amendment. The ten voters challenging the provision wanted political affiliations included in a voter's pamphlet, desired to read the endorsements of others, and felt that their rights to free speech and association were being violated by the deletions of party affiliation in the printed material. The Supreme Court held that the issue at hand was nonjusticiable, because it was questionable whether the plaintiffs had standing to defend the rights of party central committees, candidates for nonpartisan office, or members and officers of party central committees.[5] Furthermore, the voters had failed to clearly demonstrate a threat to a particular speech, and it did not appear to impose hardship for the plaintiffs to wait until a more concrete controversy arose.

In a significant case regarding hate speech, a juvenile who allegedly burned a cross on the lawn of a black family was charged under the St. Paul, Minnesota, Bias-Motivated Crime Ordinance. The ordinance specifically prohibited the display of a symbol "which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender." The charges were dismissed by the trial court on the grounds that the ordinance was overbroad and impermissibly content based, but the Minnesota State

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[3] Gentile v. State Bar of Nev., 111 S. Ct. 2720 (1991).
[4] Burson v. Freeman, 112 S. Ct. 1846 (1992).
[5] Renne v. Geary, 111 S. Ct. 2331 (1991).

Supreme Court reversed and rejected the claim that the ordinance was overbroad. The state court found the acts in the case to be indicative of "fighting words" within the meaning of an earlier decision by the United States Supreme Court and were therefore included in a category of expression unprotected by the First Amendment. The state supreme court also concluded that the ordinance was not impermissibly content-based because it served a governmental interest in protecting the community against bias-motivated threats.

Ultimately, the United States Supreme Court reversed and held that the ordinance was facially invalid under the First Amendment in that it unconstitutionally prohibited speech.[6] The ordinance went beyond content to a level of actual viewpoint discrimination. Furthermore, the ordinance was held not to serve a compelling interest in ensuring the basic human rights of groups historically discriminated against, when another ordinance could have been written and enforced that would have had the same benefit without the limitations of the specific topics included in the current ordinance.

The *R.A.V.* case relates directly to educational settings, particularly to colleges and universities where racial/ethnic slurs are prohibited and have resulted in the suspension or expulsion of guilty parties. University officials, presumably in good faith, have implemented regulations designed to protect basic human rights and encourage diversity, but may have violated the First Amendment rights of select students, staff, and faculty in the process. Related policies regarding "fighting words" should be closely examined to insure that the principles described in *R.A.V.* have not been violated.

Freedom of Press

In 1977, New York enacted a statute that required the monetary proceeds obtained from a book or other work describing a crime to be turned over to the New York Crime Victims Board for payment to victims of the crime or the person's other creditors. The statute was intended to prevent criminals from financially profiting from their notoriety. In 1981, The Simon & Schuster Publishing Company agreed to pay a writer and an admitted organized crime figure for a book about the crimes that had been committed with the crime figure's knowledge. When the Crime Victims Board became aware of this situation in 1986, it determined that the statute had been violated and ordered the crime figure and the publisher to turn over all the money payable to the crime figure in connection with the book. The publisher sought declaratory and injunctive relief under section 1983. The Supreme Court held that the statute was inconsistent with the First Amendment, because the statute singled out speech on a particular subject with a particular financial *arrangement that did not apply to* any other speech or income.[7] Despite the good intentions established by the Crime Victims Board in implementing this statute, the state had a limited interest in compensating victims from the proceeds obtained by criminals' speech on crime. Furthermore, the statute was held to be overly inclusive as a means of victim compensation from the profits of crime by including a wide range of literature that neither enabled a criminal to reap profits nor compensated a victim.

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[6] R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992).

Other Supreme Court cases examining freedom of the press provide additional information regarding this right. During a 1982 political race in Minnesota, a person associated with one of the parties gave unfavorable information about a candidate from the other party to two newspaper reporters, only after being promised that his name and identity would be kept confidential. When the stories were printed in the newspapers, the informant's name was included, based on a decision made by the editorial staffs of the papers. The informant was subsequently fired from his job, and he filed suit for punitive and compensatory damages based on a claim of fraudulent misrepresentation against the newspapers' publishers. The Supreme Court of Minnesota, essentially finding in favor of the publishing companies, held that the informant's claim was invalid under the theory that the newspapers did not uphold their promise to provide confidentiality to the informant, because such a theory would have violated the publishers' rights under the First Amendment. The Supreme Court of the United States subsequently reversed the decision of the Supreme Court of Minnesota and held that the First Amendment did not prohibit the informant from recovering damages.[8] The decision was based on the reasoning that the newspapers' breach of promise to maintain confidentiality of the informant's identity was not protected under the First Amendment.

In another "free press" case, a psychoanalyst was terminated from his position after making controversial statements about the works of Sigmund Freud during a lecture before a psychoanalytical society. The psychoanalyst had been employed as the projects director of archives containing materials about Freud prior to becoming disillusioned with Freudian psychology. Following both the psychoanalyst's lecture and additional interviews he provided to the defendant author, a book was published that included several quoted passages that were allegedly made by the psychoanalyst. The psychoanalyst claimed that the article and book written about him contained defamatory material and misquoted passages that portrayed him in an unflattering manner. The Supreme Court held that the author was not entitled to summary judgment, in part because a reasonable jury could find that the quotations presented by the author were materially different in meaning from the recorded statements made by the psychoanalyst.[9] If the degree of falsity resulted in a material change in the meaning, the jury might then infer that actual malice had been committed by the author and publisher and that the public figure (the psychoanalyst) was defamed. The case was therefore remanded.

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[7] Simon and Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501 (1991).

[8] Cohen v. Cowles Media Co., 111 S. Ct. 2513 (1991).

Freedom to Assemble

An ordinance was enacted in Forsyth County, Georgia that required permits for parades, assemblies, demonstrations, and other private uses of property. The charge for the permit was a fee of not more than $1,000 a day, and the fee was subject to adjustment by the county administrator based on administration costs and the probable cost of maintaining law and order in connection with the specific activity for which the permit was sought. The fee established for each permit did not require any explanation from the administrator, and no objective criteria were established for the administrator to use in determining the amount of the fee. Accordingly, the administrator essentially had free reign to encourage some views and to discourage others through the arbitrary assessment of fees. The Nationalist Movement requested a permit to hold a rally on the courthouse steps in opposition to the Martin Luther King, Jr. holiday. The organization was charged $100 for the required permit. The Nationalist Movement then sought injunctive relief by requesting the court to enjoin the county from interfering with the organization's proposed plans.

The permit ordinance was found to be in violation of the First and Fourteenth Amendments by the Supreme Court.[10] The Court noted that the lack of standards gave the administrator the opportunity to unconstitutionally censor selected groups requesting permits and that reducing the amount of the fee was not based on constitutional scrutiny.

Freedom of Expression

The Supreme Court will generally support statutes limiting forms of expression that are established for substantive government interests or to protect against public indecency. An Indiana statute forbidding a person to appear nude in a public place was challenged by two establishments and several dancers who performed at these businesses in South

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[9] Masson v. New Yorker Magazine, 111 S. Ct. 2419 (1991).

[10] Forsyth County, Ga. v. The Nationalist Movement, 112 S. Ct. 2395 (1992).

Bend, Indiana. The challenge was made on the grounds that the statute *violated First Amendment, free expression rights. The establishments* were permitted to provide entertainment by dancers who wore at least "panties" and "G-strings" while dancing, but they wished to provide totally nude dancing, which was forbidden under the public indecency law. A divided Supreme Court held that the Indiana public indecency law did not violate free expression protected under the First Amendment.[11] The statute furthered a substantial governmental interest to protect morals and public order, and this interest was unrelated to the suppression of free expression. Additionally, it was shown that the "evil" that the statute sought to address was public nudity and not erotic dancing.

Fourth Amendment

Cases involving search and seizure continue to struggle with "reasonableness" and "probable cause" applications. These cases offer additional insights for educators in both K-12 and higher education settings.

Search

A county police officer overheard a suspect arranging for a drug transaction on the telephone. The officer then observed the suspect commit a traffic violation and pulled the suspect over. The officer informed the suspect that he had reason to believe that there were narcotics in the car, and asked for permission to conduct a search. The suspect denied the allegations of drug possession and granted the officer permission to perform the search. During the search, the officer found and opened a brown paper bag that contained a kilogram of cocaine. The suspect then claimed that his Fourth Amendment rights had been violated by an illegal search that resulted in the officer opening a closed container. The suspect's rights under the Fourth Amendment were not violated according to the Supreme Court.[12] Because the suspect granted the officer permission to search his car, it was reasonable to conclude, under the circumstances, that containers found in the car may also be searched. Disagreeing with the majority opinion, the two justices in the minority argued that the plaintiff continued to have an expectation of privacy in the bag held within a closed container, notwithstanding that he granted permission for the search of the car.

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[11] Barnes v. Glen Theater, Inc., 111 S. Ct. 2456 (1991).
[12] Florida v. Jimeno, 111 S. Ct. 1801 (1991).

Seizure

The Soldal family resided in a mobile home on a rented lot in a trailer park. Eviction proceedings by the owner and manager of the trailer park were pending against the family for nonpayment of rent. Before the eviction was final, the owner and manager forcibly evicted the Soldal family and had their mobile home removed from the park. The mobile home suffered extensive damage during the eviction. Additionally, officers from the Cook County Sheriff's Department were present during the eviction, knew that the eviction proceedings were still pending, and still refused to act when Mr. Soldal complained to them about the criminal trespassing. The plaintiff, Mr. Soldal, brought suit claiming Fourth Amendment, Fourteenth Amendment, and section 1983 violations. In reversing the court of appeals decision, the Supreme Court held that the seizure and removal of the mobile home from the trailer park had violated the plaintiff's Fourth Amendment rights, because the Fourth Amendment protects against seizure even when no search has taken place.[13] The Court was quick to add that it did not expect this decision to produce a wave of new litigation in the federal courts over seized items. Many of the seizures involving repossessions and attachments will continue to be upheld as constitutional based on "reasonableness" grounds.

Promptness Requirement

Although the following Fourth Amendment case is not a school or university case, it does provide information for educational institutions that operate their own police units. The Fourth Amendment provides for the right of persons arrested without a warrant to be provided with judicial determinations of probable cause in a prompt manner. The County of Riverside had implemented a practice of combining the probable cause determination following warrantless arrests with the arrestees' arraignment proceedings. The arraignment proceedings were required to be conducted within two days of the arrest, excluding weekends and holidays. A complaint was filed under section 1983 by an individual who alleged that he had not received a probable cause determination despite being incarcerated in the county jail. The Supreme Court affirmed the practice of the County of Riverside in combining the probable cause determination following warrantless arrests with the arraignment proceedings, as long as the proceedings occurred within forty-eight hours.[14] The time period of forty-eight hours was held not to be unreasonable under the Fourth Amendment's promptness requirement. But the county's policy of excluding weekends and holidays that could potentially result in delays of up to seven days was held constitutionally impermissible.

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[13] Soldal v. Cook County, Ill., 112 S. Ct. 1290 (1992).

[14] County of Riverside v. McLaughlin, 111 S. Ct. 1661 (1991).

Race Discrimination

Despite a strong civil rights movement that has existed since the 1950s, the need for judicial input in cases concerning race discrimination continues. Etowah and Russell Counties in Alabama each elected their first black county commissioners in 1986. These new commissioners challenged a 1979 resolution that had removed the authority of the county commissioners and delegated it to the county engineer. Their complaint was based on alleged racial discrimination in violation of the federal Constitution and several federal statutes, because the resolutions were never submitted to the federal courts or to the United States Department of Justice for preclearance pursuant to section 5 of the Voting Rights Act of 1965 (VRA).

The Supreme Court affirmed the decision of the lower court in its ruling that neither the resolution nor the adoption of the county engineer system was subject to preclearance under the VRA; the issue simply did not reflect a change "with respect to voting."[15] Justice Kennedy, writing for the Court, made it clear that the VRA was not a general, broad-based, all-purpose, anti-discrimination statute, but rather was narrowly tailored to voting rights. This case will be of particular interest to educators and attorneys working in school systems that are covered by preclearance requirements in electing school boards and other officials.

Employment Issues

Employment issues are a continuing justiciable area of concern for public school districts and institutions of higher education. The issues addressed by the court cover a broad range of constitutional rights and federal statutes.

Risk

A sanitation department employee died of asphyxiation after entering a manhole to unstop a sewer line. The employee's widow brought suit under section 1983 claiming that the employee had a right to be free from unreasonable risks and harm and to be protected from the city's policy of deliberate indifference toward the safety of its employees under

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15. Presley v. Etowah County Comm'n, 112 S. Ct. 820 (1992).

the due process clause of the Fourteenth Amendment. She claimed that her deceased husband's rights had been violated when the city continued to follow a custom and policy of not informing its employees about the dangers they might encounter on the job.

In a unanimous opinion, the Supreme Court held that no remedy was available under section 1983.[16] The governmental employer's responsibility to provide a safe working environment was not a substantive component of the due process clause. Additionally, the Court observed that the question of the city's alleged failure to train or warn employees could best be addressed by state tort laws designed to regulate liability for injuries.

Evaluation

A psychologist who had been employed at a federal hospital in Washington, D.C. resigned from his position and assumed a new position at a United States Army hospital in West Germany. Upon requesting and obtaining information on the psychologist's former job performance, the Army denied issuing the psychologist his credentials, denied his request for employment at another Army hospital, and terminated his federal service employment after only a brief period of employment at the hospital in West Germany. The primary cause of the psychologist's "downfall" was a negative letter written by a former supervisor. The psychologist sought relief claiming that the letter written by his former supervisor infringed on his liberty interest under the due process clause of the Fifth Amendment.

Despite conflicting views as to the allegations of malicious conduct, the psychologist's constitutional rights were not denied in part because he was no longer employed at the federal hospital at the time the letter was written.[17] Additionally, although the contents of the letter were potentially damaging to the plaintiff's reputation, a related claim was held not to qualify as a liberty interest for which damages were recoverable.

Labor Unions

Discrimination. The plaintiff alleged discrimination in job referrals made by the local union of electrical workers. He claimed that this unjust treatment was in response to his opposition to a dues increase and the appointment of a union representative. The plaintiff sought injunctive relief, lost wages and benefits, and damages based on the alleged violation of the union constitution. The Court held that the plaintiff was entitled to a jury trial under title I of the Labor Management Reporting and Disclosure Act of 1959 (LMRDA).[18] Finding the LMRDA claim to be closely analogous to a personal injury action, the right to a jury trial was ruled applicable. The second part of the Court's decision pertained to section 301(a) of the Labor-Management Relations Act, 1947 (LMRA). The Court affirmed the jurisdiction of the district court in suits challenging union constitutions by individual union members. Without the ability of individual union members to sue under section 301, different meanings might develop under state and federal law that could prove to be disruptive to the negotiation and administration of interunion contracts.

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[16] Collins v. City of Harker Heights, Tex., 112 S. Ct. 1061 (1992).
[17] Siegert v. Gilley, 111 S. Ct. 1789 (1991).

Literature Distribution. A store owner disagreed with nonemployee union organizers and their alleged right to distribute literature on the employer's property based on section 7 of the National Labor Relations Act (NLRA). The store owner sought to bar the practice of nonemployees entering the store parking lot and distributing literature directly to employees and placing literature on the windshields of employees' cars.

The Supreme Court found in favor of the store owner, concluding that he had not violated the NLRA, since the location of the workplace to the living quarters of the employees was not beyond the reach of reasonable channels through which the nonemployee union organizers could communicate with the employees.[19] Therefore, the store owner was not required to allow the distribution of literature by nonemployee union organizers, and he did not violate the NLRA for prohibiting the practice of distribution on business property.

Layoffs. In August and September 1980, a company laid off ten of the forty-two workers at a plant in connection with the closing of one of the plant operations. Six of the eleven most senior employees were included in the ten workers who were laid off. The employees' union subsequently filed grievances under sections 8(a)(5) and 8(d) of the National Labor Relations Act (NLRA) claiming that the employer had violated the Act by implementing a unilateral change without bargaining to impasse. The National Labor Relations Board (NLRB) found that the employer was not in violation of the NLRA by failing to arbitrate a contractual grievance, because the agreement had not been in effect for almost a full year (the agreement had terminated on October 3, 1979). The Supreme Court upheld the reasoning of the NLRA in excluding collective-bargaining-agreement arbitration clauses from the change doctrine when an existing agreement had expired and negotiations on a new agreement had not yet been completed.[20] Furthermore, the employer was not required to arbitrate the union's grievances regarding the layoff-seniority clause that had existed in the expired agreement contract.

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[18] Wooddell v. International Bhd. of Elec. Workers, 112 S. Ct. 494 (1991).

[19] Lechmere, Inc. v. National Labor Relations Bd., 112 S. Ct. 841 (1992).

[20] Litton Fin. Printing Div. v. National Labor Relations Bd., 111 S. Ct. 2215 (1991).

Workers' Compensation

Two employers within the state of Michigan had been ordered to pay nearly $25 million they had withheld in workers' compensation benefits to disabled employees following the passage of a 1982 Michigan statute containing a "benefit coordination" provision. The provision was intended to decrease the workers' compensation benefits paid to disabled employees who were eligible to receive wage-loss compensation from other employer-funded sources. In 1987, the Michigan state legislature passed a statute that required employers to pay workers' compensation benefits to disabled employees who had been injured prior to 1982 and were not intended to be included in the "benefit coordination" provision. The employers claimed that the money they withheld was based on the "benefit coordination" reliance, and that the 1987 statute was unfairly retroactive.

Finding in favor of the disabled employees, the Supreme Court affirmed that the 1987 Michigan statute did not violate the contract clause by altering the obligation of employment contracts entered into after collective bargaining agreements.[21] Neither was the statute found to violate the due process clause, because the retroactive payment provision was a legitimate means of correcting a 1987 Michigan Supreme Court decision that held that the provision applied to workers who had been injured prior to 1982, the year the original "benefit coordination" statute was passed and implemented.

Leave of Absence

A hospital employee and National Guard member accepted a three-year full-time appointment with the National Guard and requested a leave of absence for the three-year period from the hospital. The plaintiff alleged that his right to secure an extended leave of absence and to resume his employment with the hospital following his military appointment was protected by 38 U.S.C. section 2024(d), the statute that provided reemployment rights to service personnel. The hospital denied the requested leave of absence and right to reemployment charging that the three-year period of time requested by the plaintiff was unreasonable and not guaranteed under federal statute. The Supreme Court found that the plaintiff was eligible for the leave and reemployment.[22] While a durational limit existed within the statute for the protection of other classes of full-time military personnel, section 2024(d) did not include such a limit. It was concluded, however, that the lack of inclusion of a limit was deliberate, and that the leave could be for whatever amount of time was "required to perform active duty." The hospital's claim as to the unreasonableness of the requested leave and ultimate employment protection for the plaintiff was not supported in the Court's interpretation of the statute and subsequent decision.

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[21] General Motors Corp. v. Romein, 112 S. Ct. 1105 (1992).
[22] King v. St. Vincent's Hosp., 112 S. Ct. 570 (1991).

Discrimination

Gender. Three female employees of the Tennessee Valley Authority (TVA) had been awarded backpay due them as a settlement under title VII of the Civil Rights Act of 1964 for alleged sex discrimination in salary rates. The backpay was received by the employees, and federal income taxes were withheld. The employees then sought refunds on the federal taxes that were withheld, stating that backpay awards should have been treated as "damages" and excluded from their gross income under section 104(a)(2) of the Internal Revenue Code. The backpay settlement was found not to be excludible from gross income, because it was not received as payment for a tort-like personal injury.[23] Additionally, the award received by the employees was essentially for payment of wages that were properly due and would have been fully taxable if delivered at the time the salary was actually due the employees.

Age. A manager of financial services was terminated from his employment at age sixty-two. He subsequently filed suit based on an alleged violation of the Age Discrimination in Employment Act of 1967 (ADEA). As a requirement of the job, the individual had registered with several stock exchanges. The registration application included a provision stating that he agreed to arbitrate any claim which arose between him and the corporation. Based on this agreement, the corporation relied upon the Federal Arbitration Act (FAA) and insisted that the ADEA claim be arbitrated. Because the employee was an experienced business man who was not coerced or defrauded into signing the arbitration agreement, and because the individual could not show why the ADEA claim could not be arbitrated, the Supreme Court held that a claim under the ADEA could be required to be subjected to compulsory arbitration under the FAA.[24]

In another age discrimination case, a sixty-three year-old individual was accepted into a United States Internal Revenue Service training program in August 1986. In April 1987, the employee was transferred and demoted, and later filed suit claiming age discrimination. The Department of the Treasury fought to discount the employee's claim based on the untimely manner in which the claim was filed with the Equal Employment Opportunity Commission (EEOC) (deadline for filing a claim is 180 days) and the plaintiff's failure to notify the EEOC within thirty days prior to commencing a suit. The Supreme Court disagreed with the Treasury Department that the complaint was time barred and held that the employee had, in fact, acted in a timely manner by notifying the employing agency on the 176th day after the demotion, and by filing a civil action more than thirty days after the EEOC was notified.[25] The Court refused to address the assertion by the Treasury Department that the plaintiff failed to exhaust administrative remedies.

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[23] United States v. Burke, Center, and Gibbs, 112 S. Ct. 1867 (1992).
[24] Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1991).

Age discrimination was again alleged in a case involving a sixty-three year old employee who was dismissed from his position as vice president of a federal savings and loan. He subsequently filed a claim under the Age Discrimination in Employment Act (ADEA) after his original claim filed with the EEOC was held invalid. That conclusion was reached by the New York State Division of Human Rights, the division responsible for reviewing age discrimination cases under state law. The district court held that the state administrative decision on an age discrimination claim prevented federal litigation on the same ADEA claim. The Second Circuit reversed the district court decision based on the intent of the ADEA to prohibit any preclusive action on a claim following state administrative proceedings. The Supreme Court affirmed the decision of the circuit court and remanded the case for further consideration.[26]

Due Process

Termination. An assistant city manager was terminated from his employment as a public employee. He subsequently brought a civil rights action against the city and the city manager for depriving him of due process when he was discharged without a pretermination hearing. The district court dismissed the action on the grounds that the statute of limitations in the case had expired. The Ninth Circuit reversed the district court decision and disagreed with the district court's interpretation of the date from which the statute of limitations began to toll (i.e., the date the discharge notice was received). The appellate court held that the statute of limitations began on the date that the plaintiff's employment was actually terminated, rather than on the date that he was given the discharge notice. The decision of the Ninth Circuit was allowed to stand when the Supreme Court denied *certiorari*.[27]

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[25] Stevens v. Department of the Treasury, 111 S. Ct. 1562 (1991).

[26] Astoria Fed. Sav. and Loan Ass'n v. Solimino, 111 S. Ct. 2166 (1991).

[27] Hoesterey v. Cathedral City, 945 F.2d 317 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1941 (1992).

In another case involving termination, an honorably discharged war veteran was employed by the Detroit Fire Department as a Civil Defense Coordinator until his discharge on February 19, 1982. His discharge came after he was observed verbally abusing and threatening a fellow employee. During the initial investigation of the incident, another employee submitted a statement that the plaintiff had pulled a gun on him the day before the observed incident occurred. Several years after the employee's discharge a writ of mandamus was filed alleging that the discharge had violated his due process and equal protection rights as well as his rights under the Veterans Preference Act (VPA).

The Court of Appeals of Michigan held that the employee's due process rights were not violated when the city (1) did not specifically state in its notice that the type of misconduct demonstrated by the employee might result in disciplinary action, or (2) failed to offer a pre-disciplinary hearing when the employee would not acknowledge the suspension that had been ordered at a prior hearing. Finally, the city was ruled not to have violated the VPA by failing to specify grounds for suspension or discharge. The aforestated decision was appealed to the United State Supreme Court where *certiorari* was denied.[28]

Children

Abortion Rights

Because the majority of students in K-12 school systems are minors, cases involving children and their rights regarding "choice" will be important to educators in determining the need for courses in sex education, the role of the school counselor, and the need for child-care programs. Educators need to know both the student's rights as well as school district responsibilities.

A Pennsylvania statute addressing the issue of abortion was amended in both 1988 and 1989. Among the amendments were provisions requiring (1) a twenty-four hour waiting period and (2) informed parental consent from at least one parent or guardian when the person seeking the abortion is a minor. However, if the minor did not wish to, or could not, obtain parental consent, a judicial bypass option was available. These provisions, and others, were challenged as unconstitutional by several abortion clinics and physicians. The Supreme Court affirmed its basic premise that a woman has the right to choice consistent with its reasoning in *Roe v. Wade* in 1973,[29] while upholding both the twenty-four hour waiting period and the parental consent requirement.[30]

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[28] Adams v. Detroit, 458 N.W.2d 903 (1990), *cert. denied*, 112 S. Ct. 441 (1991).

Juvenile Delinquents

A juvenile living on an Indian reservation caused the death of a child during an incident when the juvenile was intoxicated and recklessly driving a stolen car. The same acts, if committed by an adult, would have constituted the crime of involuntary manslaughter. The district court held that the Juvenile Delinquency Act required the length of detention of the juvenile to be limited to the maximum term of imprisonment that would have been authorized if the juvenile had been tried and convicted as an adult. However, on appeal, the Eighth Circuit vacated the decision in light of application of the United States Sentencing Guidelines which imposed a sentence that would have been placed on a similarly situated adult. The juvenile's original sentence of three years was subsequently reduced to a maximum detention period of twenty-one months, because the juvenile had the lowest possible criminal history level.

The Supreme Court affirmed the decision and interpretation of the Eighth Circuit.[31] Despite the ambiguity of the length of detention mandated under the Juvenile Delinquency Act in relation to the term of imprisonment provided for by the specific offense, the United States Sentencing Guidelines should be used to clarify the imposed sentence based on the importance of considering the circumstances of the offensive action prior to instituting the maximum sentence that could be applied to an adult offender of the same crime.

Crimes Against Children

There are numerous federal statutes that have been designed with the primary purpose of protecting children. Several of those laws are discussed in the following paragraphs and include allegations of pornography, murder, and sexual assault.

Prior to the passage of the Child Protection Act of 1984, which criminalized the distribution of sexually explicit depictions of children through the mail, a Nebraska farmer legally ordered and received two magazines containing photographs of nude preteen and teenage boys. Following the passage of the Act, the Postal Service found the farmer's name on a mailing list and attempted to explore his willingness to violate the Act by ordering additional publications. The Postal Service used the names of fictitious organizations to send enticing letters to the farmer in an attempt to get his mail order business. Twenty-six months after the Postal Service began its investigation, the farmer responded to one of the letters and advertisements by placing an order. The farmer was then arrested. A subsequent search of the farmer's home revealed only the magazines the farmer had originally ordered plus the materials sent to him from the Postal Service during the investigation. There were no other materials to indicate that the farmer was actively involved in obtaining child pornography.

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[29] Roe v. Wade, 410 U.S. 113 (1973).

[30] Planned Parenthood of Southeastern Penn. v. Casey, 112 S. Ct. 2791 (1992).

[31] United States v. R.L.C., 112 S. Ct. 1329 (1992).

On *certiorari*, the Supreme Court reversed the decision of the Eighth Circuit in noting the inability of the government to establish probable cause in assuming the farmer was predisposed to ordering pornographic materials through the mail.[32] Furthermore, the letters and communications produced by the Postal Service may have served to heighten the farmer's desire to receive additional information and materials that he may have otherwise been uninterested in obtaining. By continuing to pursue the interest of the farmer in such a luring manner, the government had acted against congressional intent in implementing the protections available in the Child Protection Act, and had essentially entrapped the farmer into a punishable situation.

In a case related to the physical abuse of children, a California man was charged with second-degree murder for allegedly killing his infant daughter. During his trial, evidence was introduced to prove the "battered child syndrome," as well as information on previous rib and rectal injuries found on the infant. Following the guilty conviction, there was judicial discrepancy as to whether the information related to the prior injuries could be used against the accused, when it had not been proven previously that the accused was responsible for those injuries. The Supreme Court upheld the use of prior injuries as evidence in establishing the "battered child syndrome," and in attempting to establish a connection between the infant's previous injuries and the injury that led to the infant's death.[33] The introduction of such evidence did not manifest a level of unfairness so as to deny due process, and proved helpful in establishing (beyond a reasonable doubt) that the death was an intentional act, not an accident.

A related case of abuse of a child involved an Illinois man who was accused and convicted of aggravated criminal sexual assault, residential burglary, and unlawful restraint. The sexual assault occurred on a child. During the trial, the State attempted to call the child as a witness two times, but each time the child experienced emotional difficulties and was unable to testify. The trial court agreed to accept spontaneous declarations and statements made by the child to other adults (babysitter, mother, doctor, emergency room nurse, etc.). The accused appealed on the basis that his rights had been violated under the confrontation clause of the Sixth Amendment, because the accused did not have the right to confront the witness against him. The Supreme Court held that hearsay evidence was acceptable under the circumstances, particularly if it could be shown that the witness was unable to testify.[34] The Court reasoned that the confrontation clause applied more to statements made out of court that were made for the principal purpose of accusing or incriminating. Furthermore, confrontation exceptions could be made when a child's physical and psychological well-being must be protected.

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[32] Jacobson v. United States, 112 S. Ct. 1535 (1992).

[33] Estelle v. McGuire, 112 S. Ct. 475 (1991).

Taxation

Property taxes continue to provide significant revenue for local school districts, notwithstanding their general regressivity and other limitations.[35] Additionally, sales and income taxes are used by state governments and continue to generate the bulk of funds available at that level. A change in any of these tax sources could significantly affect the amount of revenue available to public schools, colleges, and universities.

Property Tax

After purchasing a house in Los Angeles County, the plaintiff filed a suit against the county and its tax assessor claiming that article XIIIA of the State Constitution of California, implemented with the passage of California's Proposition 13, violated the Equal Protection Clause of the Fourteenth Amendment. Article XIIIA allowed for the reassessment of property up to its current appraised value upon new construction or a change in ownership. The only exceptions to the reassessment provision were for persons over the age of fifty-five and transfers made between parents and children. The acquisition-value system of taxation established by article XIIIA created great disparities in the taxes paid by people who owned relatively similar pieces of property. Long-term home owners paid lower taxes, while newer owners paid substantially higher taxes based on more recently appraised values.

The Supreme Court held that the aforementioned practice did not violate the Equal Protection Clause of the Fourteenth Amendment for several reasons.[36] The tax classification was found to rationally further at least two legitimate state interests: (1) the acquisition-value system discouraged rapid turnover in ownership of homes and businesses thereby preserving the stability of neighborhoods, and (2) the buyer of a new home has the option not to purchase the property if the taxes are too high, while an existing owner is already saddled with the purchase of the property regardless of the increases in taxes. Two exemptions included in article XIIIA add further protection to legitimate state interests including (1) the ability of older persons to move into another residence more suited to their decreased family size and income, and (2) maintaining the stability of property when it is transferred between parents and children.

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[34] White v. Illinois, 112 S. Ct. 736 (1992).

[35] L.D. WEBB, ET.AL, FINANCING ELEMENTARY AND SECONDARY EDUCATION, 91-97 (1988).

[36] Nordlinger v. Hahn, 112 S. Ct. 2326 (1992).

State Sales Tax

The state of North Dakota attempted to collect a use tax from a mail-order company that had no outlets or sales representatives in the State. The use tax was expected to be paid on all goods purchased for use within the State. The trial court found this case to be similar to *National Bellas Hess, Inc. v. Department of Revenue of Illinois*,[37] where the Supreme Court held that a state statute requiring the collection of a tax on a company that had no connection with the State, other than through "the mail," placed an unconstitutional burden on interstate commerce. The state supreme court reversed and reasoned that physical presence within the state could not be the sole criterion in determining whether there had been a legitimate exercise of state power.

On further appeal, the United States Supreme Court reversed, although it agreed with the North Dakota Supreme Court that enormous "social, economic, commercial, and legal innovations" in the last twenty-five years have had an impact on the solubility of the decision.[38] The Supreme Court mentioned that perhaps this issue would be better resolved by Congress since it is more qualified to make decisions on interstate business and taxation.

Amending Consent Decrees

The two cases discussed below may prove relevant in education-related cases where consent decrees, particularly those involving desegregation, are approved by the courts. Given these cases, it may be easier in the future to alter original decrees where significant changes in circumstances have occurred or where the goals of the original decrees would be difficult or impossible to meet given existing conditions.

An important case originated in 1971 when the inmates in the Suffolk County Jail (Boston, Massachusetts) sued the county sheriff, the state commissioner of corrections, the mayor of the city of Boston, and nine city councilors, claiming that the conditions under which inmates were being held in the jail violated the Federal Constitution. Following many years of legal deliberations and judicial proceedings, a consent decree was entered by the district court in 1979. The consent decree required the construction of a new jail with single-occupancy cells. During the jail construction, the county sheriff moved to have the court relieve the county from the final judgment requiring single-occupancy cells. Based on the increase in the population of pretrial detainees, the sheriff was requesting the change to allow for double bunking. Both the district and appellate courts refused to permit a change in a consent decree that had been reached after years of litigation and with the consent of all concerned parties.

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[37] National Bellas Hess, Inc. v. Department of Revenue of Ill., 386 U.S. 753 (1967).

[38] Quill Corp. v. North Dakota, 112 S. Ct. 1904 (1992).

The Supreme Court vacated the decision of the circuit court and remanded the case for further proceedings.[39] The Court held that the "grievous wrong" standard, normally applicable to consent decrees under Rule 60(b) of the Federal Rules of Civil Procedure, did not apply to consent decrees stemming from institutional reform litigation. The Rule did provide for some flexibility, however, in relieving a party from a final judgment when the terms were no longer equitable, particularly in light of the fact that many consent decrees are in place for extended periods of time during which the likelihood of significant changes taking place increases drastically. The party requesting relief from the final judgment is still required to establish a meaningful case as to the reasons for altering a previously agreed upon consent decree.

In a related case, a group of death row prisoners had entered into a consent decree with the prison officials at San Quentin prison in 1980 following treatment that constituted cruel and unusual punishment. In 1990, the prisoners sued the prison officials seeking enforcement of the consent decree upon which they had agreed some ten years earlier. The Ninth Circuit Court affirmed the judgment of the district court, which included the right of the lower court to modify the agreement, specifically in areas where modification was necessary in order to accomplish the primary goals of the original decree. For example, the court affirmed the legitimate expansion of the decree to cover death row prisoners housed in other areas in the prison. Death row prisoners had required alternative housing locations within the prison during periods of renovations and when increasing numbers of inmates were sentenced to death row. Finally, the court upheld the withdrawal of privileges to dangerous prisoners when warranted. The modifications in the consent decree made by the district court did not represent an abuse of discretion and were therefore affirmed by the circuit court. The Supreme Court denied

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[39] Rufo v. Inmates of Suffolk County Jail, 112 S. Ct. 748 (1992).

certiorari thereby allowing the Ninth Circuit Court of Appeals decision to stand.[40]

Tort Law

Suit was brought by the widow of a patient who suffered irreversible brain damage and eventually died due to the negligence of employees at a Veteran's Administration hospital. The suit, for damages for loss of enjoyment of life and for future medical expenses, was initiated soon after the act of neglect occurred. After the patient's injury, but prior to his death, he received free medical treatment at the hospital. According to the Supreme Court, the Federal Tort Claims Act barred the recovery of damages that were intended to act as punishment for intentional conduct but did not limit liability to compensatory damages for actual pecuniary losses.[41] Damages for loss of enjoyment of life and for future medical expenses were not punitive under the Act, according to the Court. Therefore, only those damages that were legally considered punitive under traditional common-law principles could be banned from awards.

Sport

The following case explores the degree to which a private athletic organization can infringe a student's athletic participation. This case has implications for both K-12 and higher education.

The International Amateur Athletic Federation, serving as a private organization governing amateur athletes, sought to interfere with an athlete's participation in the Olympic Trials. The district court entered a preliminary injunction barring the interference of the organization. This decision was overturned later the same day by a stay on the injunction issued by the Sixth Circuit. The athlete then turned to the Supreme Court to reverse the court of appeals' stay order. The Supreme Court granted the application for the requested stay, thereby barring the International Amateur Athletic Federation from interfering with the athlete's ability to compete.[42] Justice Stevens, writing as an individual Circuit Justice, reasoned that the athlete had established a probability of success; that a damage award would be an inadequate substitute to athletic participation; and that participation in the trials was presumably prerequisite to Olympic participation.

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[40] Thompson v. Enomoto, 915 F.2d 1383 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 965 (1992).

[41] Molzof v. United States, 112 S. Ct. 711 (1992).

[42] Reynolds v. International Amateur Athletic Fed'n, 112 S. Ct. 2512 (1992).

Attorney Fees

Several cases were reviewed by the Supreme Court regarding attorney fees, the determination of the prevailing party, and the right to collect for retaining counsel. Two of those cases are summarized below.

A Vermont landowner sought reimbursement for his attorney fees under the Solid Waste Disposal Act (SWDA) and the Clean Water Act (CWA). The district court found the attorney fees to be reasonable for the prevailing party and awarded the landowner an additional 25% above the "lodestar" amount in contingency enhancement. The circuit court affirmed the judgment of the lower court. The Supreme Court subsequently reversed the circuit court's decision in awarding the 25% enhancement.[43] In the majority opinion written by Justice Scalia, the Court held that while the SWDA and CWA provided for the awarding of attorney fees to prevailing parties, the statutes did not provide for the enhancement of the fee award in order to acknowledge that the party's attorneys were retained on a contingency basis. Therefore, the payment of contingency enhancement fees was clearly beyond the scope and magnitude for which the payment of reasonable attorney fees to prevailing parties was established.

A second case involving attorney fees resulted from a long legal battle over a section 1983 violation. The district court awarded the attorney fees, and the defendants appealed to the court of appeals. At the circuit court level, the court held that the plaintiffs were not "prevailing parties" under section 1988, and the earlier decision made by the lower court was reversed. The nominal damages ($1) awarded by the trial court did not justify the claim of plaintiffs that they were the prevailing party and thus did not make them eligible for the award of attorney fees. The Supreme Court granted *certiorari* to determine whether a plaintiff who receives only a minimal damage award is considered to be a prevailing party for the purposes of attorney fee awards.[44]

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[43] City of Burlington v. Dague, 112 S. Ct. 2638 (1992).

[44] Farrar v. Cain, 941 F.2d 1311 (5th Cir. 1991), *cert. granted, sub nom.*, Farrar v. Hobby, 112 S. Ct. 1159 (1992).

9

FEDERAL and STATE LEGISLATION

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Introduction

This chapter appears for the first time in the NOLPE *Yearbook*. It summarizes major education legislation in the United States Congress and state legislatures for the year 1992.

Federal Legislation

Education statutes during the 1992 national election year were limited. The Neighborhood Schools Improvement Act—the Democrat's response to President Bush's America 2000 agenda—died in the final days of the 102nd Congress and was expected to be reintroduced in the 103rd Congress. The major 1992 education enactment was the reauthorization of the Higher Education Act of 1965. Also of interest are the Education of the Deaf Amendments of 1992, an amendment to the Rehabilitation Act of 1973 with implications for schools, and the fiscal year (FY) 1993 appropriations act for public and higher education. Highlights of each follow.

Higher Education Amendments of 1992

The Higher Education Amendments of 1992[1] reauthorized the Higher Education Act of 1965 for five more years. Several hundred pages in length, the Act continues most major federal programs in postsecondary education. The Act governs loans and grants to postsecondary students attending colleges, universities, and trade schools, including for-profit (proprietary) schools. Among major changes in the Act are (1) a provision allowing all students, regardless of income, to borrow money under federal loan programs to pay for their education, (2) provisions removing a family's home or farm equity from calculations of financial need, (3) a demonstration program in which the government will make loans directly to students, bypassing the banks, and (4) a requirement that all student applicants for federal aid use an application form developed by the Department of Education. These and other major provisions of the Act are described below.[2]

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[1] Pub. L. No. 102-325, 106 Stat. 448 (1992).

Federal Pell Grants. In FY 1992, about 3.8 million students received $5.5 billion in Federal Pell grants, outright grants to the neediest of the country's postsecondary students. During the course of reauthorization, Congress voted not to fund these grants as a mandatory spending (entitlement) program for all eligible students; thus, it remains as a discretionary spending program. Congress has continued to underestimate the costs of this grant program. As a result, although Congress authorized an increase in the grants from the current $3,100 per year to $3,700 for the 1993-94 academic year (with an additional $200 in each of the following four years), the actual appropriations were cut from the standard $2,400 per student to $2,300 per student. The minimum award was raised from $200 to $400 per student. A single need analysis formula was substituted for the existing formula. Furthermore, over $200 million of the FY 1993 appropriation was earmarked for unfinanced costs (shortfall) in the prior-award-year Pell grant program.

Federal Supplemental Educational Opportunity Grants (SEOG). Federal SEOG grants supplement Federal Pell grants by providing matching funds to schools to distribute to their neediest students. Nearly one million students received an average award of $715 per student in FY 1992. The Act authorized an increase in funding from the FY 1992 appropriation and dropped the federal share of the program from 85% to 75%.

Work-study Programs. The Act requires all schools, beginning in FY 1994, to use at least 5% of their work-study federal funds for community service work-study programs to improve the quality of life for community residents in such areas as health care, child care, literacy training, and education, particularly for low-income individuals. A waiver is available when the requirement would cause student hardship. The Act also lowers the school portion of matching funds from 30% to 25%.

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[2] Much of the background information in the following sections is taken from a comprehensive summary of the law found in *Provisions: Higher Education Reauthorization*, CONG. Q., Oct. 31, 1992, at 3510-3517.

Federal Perkins Loans. Federal Perkins loans, along with the work-study programs and SEOG grants, are referred to as campus-based programs. A revolving loan fund provides low-interest loans to students, allowing all undergraduates to borrow $3,000 per year and graduate students to borrow $5,000. Under the new act, the campus match will increase from 10% to 15% in FY 1993 and to 25% thereafter. The interest rate continues at 5%.

Guaranteed Student Loans. The Federal Robert T. Stafford Student Loan Program allows students to borrow from private banks, with the federal government paying the interest while the student is in school. The federal government also guarantees repayment of the principal should the student default on the loan. The Act extends this program through October 1, 1998. In FY 1992, 3.7 million students received Stafford loans worth $10.3 billion in aid.

First year, full-time undergraduate students will continue to have a loan limit of $2,625. The second-year cap will rise from the current ceiling of $2,625 to $3,500. The cap for students successfully completing two years will rise from the current ceiling of $4,000 to $5,500. The annual loan limit for graduate students will be $8,500, up from $7,500. Interest rates are capped at 9% in the new law.

The Act creates a new, unsubsidized Stafford loan program for students who do not qualify for the subsidized loans. The program is similar to the subsidized Stafford loan program except that students generally will pay interest on their loans while they are in school or while the loans are in deferment. An origination and insurance fee of 6.5% is required.

The Department of Education is authorized to conduct a demonstration program whereby it assumes varying percents of the Stafford loans for those who enter the teaching or nursing profession and those who perform national community service. Certain conditions of employment apply.

The Secretary is to assure a common application form for all student loans and is to spend $25 million in FY 1993 to reduce defaults on student loans through program reviews, audits, debt management programs, and training activities. Additionally, situations in which students may defer repayment of their loans have been reduced from thirteen to three: enrollment at school, unemployment, and economic hardship.

The Education Department has never issued regulations for changes to the student loan program made by the 1986 reauthorization of the Higher Education Act. The 1992 reauthorization specifies that the government must stop guaranteeing new loans after June 30, 1994, if the Secretary of Education has not issued final regulations by then.

Federal Direct Loan Demonstration Program. The most controversial provision in the Act is the one requiring the Secretary of Education to conduct a direct loan demonstration program between July 1, 1994 and June 30, 1998. Students at schools selected by the Secretary will be entitled to receive payments directly from the federal government and will not be eligible for federal Stafford, PLUS (parent loans to undergraduate students), or SLS (supplemental loans for students) loans. Both subsidized and unsubsidized direct loans will be available under the same terms and conditions as the Stafford loan program. The Secretary will choose schools with an aggregate loan volume of $500 million for Stafford, SLS, and PLUS loans. Thirty-five percent of the schools are to allow students to repay the loans according to how much money they earn after graduation; students at other institutions will pay a fixed amount each month.

Behind the demonstration program is congressional desire to save money by making loans directly to students and eliminating the intermediary role of the banks. According to the General Accounting Office, the federal government could save about $4.5 billion over five years by switching to direct loans and eliminating federal subsidies to the banks for making loans.[3] The banks objected to the introduction of this program.[4]

Need Analysis. In calculating parental net worth to determine the amount that the student's family reasonably may be expected to contribute toward the student's postsecondary education, the family's home or farm equity need no longer be included. The expectation is that more students from middle-income families will be eligible for aid programs under the revised standards.

Trio Programs. Funding for Talent Search, Upward Bound, Student Support Services, Education Opportunity Centers, and Staff Development Activities continues, all with the intent to prepare students from disadvantaged backgrounds to succeed in postsecondary education and to support their efforts to do so.

National Early Intervention Scholarship & Partnership Program. The Secretary of Education is authorized to create a program of incentives to states to provide counseling, mentoring, academic support, and other services to public school students who are at risk of dropping out. The ultimate purpose is to encourage states to guarantee to eligible low-income students who graduate from high school that financial aid will be available to them to attend postsecondary school. States must provide at least 50% matching funds.

Institutional Aid. The Act authorizes $45 million in FY 1993 for a new category of institutions serving large numbers of Hispanic students who are first-generation college students or are low-income students. It also authorizes $135 million in FY 1993 for grants to help historically black colleges and universities raise money, improve teacher education programs, and encourage public school students to enhance their preparation for and interest in higher education.

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[3] J. Zuckman, *As Bush Drops Loan Objections, Student Aid Nears Enactment*, CONG. Q., July 4, 1992, at 1967.

[4] *Issue: Higher Education*, CONG. Q., Sept. 5, 1992, at 2622.

Educator Recruitment, Retention, and Development. The Act authorizes $350 million in FY 1993 for teacher excellence programs provided by state and local education agencies (SEAs and LEAs) and institutions of higher education. The LEAs will use the money for teacher training and recruitment, to form business partnerships, and to attract military veterans into teaching. The SEAs will use the money to study state teacher certification standards and to establish state academies for teachers and school leaders. Institutions of higher education may apply for state grants to help LEAs provide teacher training.

Also among the programs emphasizing elementary and secondary education are establishment of up to three national teacher academies to improve teacher training in content areas; designation of "teacher corps" schools with high poverty levels and low student achievement, and "teacher corps" scholarships for students who will promise to teach in those schools; grants for development of alternative teacher certification requirements and for evaluation of class size reductions; and grants for minority teacher recruitment, early childhood education training, and violence counseling.

International Education. Funding for a variety of international education programs is authorized, including undergraduate and graduate language centers; area centers, such as centers for European or African studies; international business education centers; and creation of an Institute for International Public Policy.

Other Programs. Among other targeted financial aid programs are a number of undergraduate scholarship and graduate fellowship programs. Among the demonstration, model program, and training grants are those for: community partnership and counseling; development of a computerized financial aid data base; a national student savings program to encourage families to save for their children's postsecondary education; students from migrant and seasonal farm-worker families; postsecondary improvement programs; community service programs; cooperative education programs; secondary and postsecondary school partnerships for disadvantaged students; and technical assistance for secondary school guidance counselors, teachers, and principals. The Act authorizes $65 million in FY 1993 grant programs to academic libraries to strengthen various aspects of library and information services. Grants for construction, reconstruction, and renovation of academic facilities are also authorized.

The Act repeals a program providing funds to higher education institutions based on the number of students awarded Pell grants. It also repeals the Veterans Education Outreach Program, which provided $2.7 million during FY 1992 for tutoring and counseling veterans at postsecondary schools.

Rehabilitation Act Amendments of 1992

The Rehabilitation Act Amendments of 1992[5] reauthorized the Rehabilitation Act of 1973. Although the Act focused primarily on employment and independent living, it also included an amendment to the Individuals with Disabilities Education Act (IDEA). The amendment calls for a ninety-day public comment period on a proposed new definition of "serious emotional disturbance" (SED), one of the categories of disability that allow children to be eligible for special education under IDEA. The required Notice of Inquiry (NOI) is to solicit comments on the proposal to change the current term to "emotional or behavioral disorder" and to broaden the existing definition of SED to mean a disability that is:

- (i) characterized by behavioral or emotional responses in school programs so different from appropriate age, cultural, or ethnic norms that the responses adversely affect educational performance, including academic, social, vocational, or personal skills;
- (ii) more than a temporary, expected response to stressful events in the environment;
- (iii) consistently exhibited in two different settings, at least one of which is school related; and
- (iv) unresponsive to direct intervention applied in general education, or the condition of a child is such that general education intervention would be insufficient.

The term would include such a disability that co-exists with other disabilities, and would include a schizophrenic disorder, affective disorder, anxiety disorder, or other sustained disorder of conduct or adjustment, if the disorder affects educational performance as described in (i)-(iv) above. Within ten months of October 29, 1992, the Secretary of Education is to prepare a report summarizing the comments received and recommending whether to change the definition.

Education of the Deaf Amendments of 1992

The Education of the Deaf Act Amendments of 1992[6] reauthorized the Education of the Deaf Act through 1997. The Act extends and amends the authorizations for Gallaudet University in Washington,

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[5] Pub. L. No. 102-569 § 912(b), 106 Stat. 4344 (1992).

[6] Pub. L. No. 102-421, 106 Stat. 2151 (1992).

D.C., and the National Technical Institute for the Deaf (NTID) in Rochester, New York, both of which are primarily funded with federal money. Major provisions include:

- application of various provisions of IDEA to Gallaudet's two model and demonstration schools when parents choose to place their children at these schools as private placements;
- limitations on the number of new, incoming foreign students at Gallaudet and NTID to 10% of total enrollment;
- a tuition surcharge for postsecondary foreign students;
- authorization for grants to colleges and other institutions to train education interpreters for the deaf;
- authorization for minority scholarships for individuals who are deaf and who plan to enter the fields of special education or deaf education;
- increased accountability for federal funds provided to the two institutions;
- improved administration of the institutions' programs; and,
- consolidation of the authorities for the Kendall Demonstration School and the Model Secondary School for the Deaf to better coordinate the programs of the two schools.

Fiscal Year 1993 Education Appropriations Act

Following are the FY 1993 appropriations enacted for federal elementary, secondary, and postsecondary education programs,[7] compared to the 1992 appropriations for the programs. Under Section 511 of the Act, all discretionary programs ("all programs not mandated by law") in the Labor, Health and Human Services, and Education appropriations act were subjected to an .8% across-the-board cut. That accounts for 1993 figures just slightly below 1992 in a number of cases.

Total spending for Education Department programs during FY 1992 was $27,352,004,000. Overall, the FY 1993 appropriations act appropriates $28,333,517,000 or approximately $1 billion more than in FY 1992. As can be calculated from the figures below, approximately $13 billion was for public education (including vocational and adult education programs), and approximately $13 billion for postsecondary education. An additional $2 billion was for rehabilitation services (not included in the following tables). The largest dollar increase—$500 million plus—was in the area of Student Financial Assistance.

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[7] Pub. L. No. 102-394, 106 Stat. 1792 (1992).

As reported by *Education Week*,[8] here are the FY 1993 appropriations adjusted to reflect the .8% cutback in discretionary programs. Figures reported by *Congressional Quarterly*[9] vary slightly from those reported below.

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[8] *Final Education Department Budget for Fiscal 1993*, XII EDUCATION WEEK 6, Oct. 14, 1992, at 20-21.

[9] J. Rovner, *Appropriations: Devoid of Trouble, Bill Goes to Bush*, Labor-HHS-Education Spending, CONG. Q., Oct. 10, 1992, at 3164.

FY 1993 EDUCATION APPROPRIATIONS BUDGET

	FY 1992 Comparable	FY 1993 Final
COMPENSATORY EDUCATION FOR THE DISADVANTAGED		
Chapter 1		
Grants to local education agencies		
Basic grants	$5,524,310,000	$5,449,924,000
Concentration Grants	609,930,000	675,998,000
Capital exp. priv. sch. children	40,054,000	39,734,000
Even Start	70,000,000	89,280,000
State agency programs		
Migrant	308,298,000	302,773,000
Neglected and delinquent	36,054,000	35,407,000
State administration	61,820,000	60,712,000
State program improvement	25,125,000	25,933,000
Evaluation/technical assistance	15,088,000	14,731,000
Rural technical assistance centers	5,000,000	4,960,000
Total, Chapter 1	6,695,679,000	6,699,452,000
Migrant Education		
High school equivalency program	8,310,000	8,161,000
College assistance program	2,265,000	2,224,000
Total, Migrant Education	10,575,000	10,385,000
TOTAL COMPENSATORY EDUCATION	**6,706,254,000**	**6,709,837,000**

	FY 1992 Comparable	FY 1993 Final
IMPACT AID		
Maintenance and Operations		
Payments for "a" children	588,540,000	584,758,000
Payments for "b" children	136,626,000	135,414,000
Payments for federal property	16,590,000	16,293,000
Payments re decreased activity	1,952,000	1,786,000
Total Maint./Oper.	743,708,000	738,251,000
Construction	27,990,000	11,904,000
TOTAL, IMPACT AID	771,698,000	750,155,000
SCHOOL IMPROVEMENT PROGRAMS		
Educational Improvement (Chapter 2)		
State and Local Programs		
State block grants	450,000,000	435,488,000
National Programs		
Inexpensive book distr.	10,000,000	10,029,000
Arts in education	8,600,000	6,944,000
Law-related education	6,000,000	5,952,000
Total, Chapter 2	474,600,000	458,413,000
Drug-Free Schools and Communities		
Stage grants	507,663,000	498,565,000
School personnel training	23,863,000	13,614,000
National programs	62,133,000	61,636,000
Emergency grants	30,304,000	24,552,000
Total, drug-free schools	623,963,000	598,367,000

	FY 1992 Comparable	FY 1993 Final
Math and Science Ed.	240,000,000	246,016,000
Christa McAuliffe fellows	2,000,000	1,964,000
Magnet schools (deseg.)	110,000,000	108,029,000
Education homeless children, youth	25,000,000	24,800,000
Women's educ. equity	500,000	1,984,000
Training/advis. Civil Rights Act	22,000,000	21,606,000
Dropout prevention demonstrations	40,000,000	37,705,000
Assist., Virgin Islands	4,500,000	2,455,000
Ellender Fellowships/CloseUp	4,300,000	4,223,000
Follow Through	8,632,000	8,478,000
Native Hawaiian Ed. Act	6,400,000	6,448,000
Foreign Language Assist.	10,000,000	10,912,000
TOTAL, SCHOOL IMPROVEMENT	1,571,895,000	1,531,400,000
EDUCATIONAL EXCELLENCE/AMERICA 2000		
America 2000 legislation	99,115,000	-
(1992 approp. not spent a/c authorization not enacted)		
School choice, new legis.	-	-
INDIAN EDUCATION		
TOTAL	76,570,000	80,583,000
BILINGUAL AND IMMIGRANT EDUCATION		
Bilingual programs	147,407,000	149,758,000
Support services	12,000,000	10,999,000

	FY 1992 Comparable	FY 1993 Final
Training grants	36,000,000	35,708,000
Immigrant education	30,000,000	29,462,000
TOTAL BILINGUAL AND IMMIGRANT EDUCATION	225,407,000	225,927,000
SPECIAL EDUCATION		
Grants to states, Part B	1,976,095,000	2,052,730,000
Chapter 1 handicapped grants	143,000,000	126,394,000
Preschool grants	320,000,000	325,773,000
Grants for infants, families	175,000,000	213,280,000
Total, state grants	2,614,095,000	2,718,177,000
Special purpose funds		
Deaf-blindness	13,000,000	12,832,000
Severe disabilities	8,000,000	9,330,000
Severe emotional disturbance	4,000,000	4,147,000
Secondary/transitional services	19,000,000	21,966,000
Early childhood education	25,000,000	25,167,000
Postsecondary education	9,000,000	8,839,000
Innovation and development	21,000,000	20,728,000
Media and captioning service	17,000,000	17,892,000
Technology applications	10,000,000	10,862,000
Special studies	4,000,000	3,948,000
Personnel development	89,800,000	90,223,000
Parent training	12,000,000	12,400,000

	FY 1992 Comparable	**FY 1993 Final**
Clearinghouses	2,000,000	2,162,000
Regional resource centers	7,000,000	7,218,000
Total, special purpose funds	240,800,000	247,714,000
TOTAL, SPECIAL EDUCATION	2,854,895,000	2,965,891,000
VOCATIONAL AND ADULT EDUCATION		
Vocational and applied education		
Basic grants	949,750,000	972,750,000
Supplemental equipment grants	9,950,000	—
Community-based organizations	12,000,000	11,785,000
Consumer/homemaking educ.	35,000,000	34,720,000
State Councils	9,000,000	8,928,000
Tech Prep	90,000,000	104,160,000
Tribally controlled postsec. voc.	2,500,000	2,946,000
National programs	30,000,000	31,585,000
Bilingual voc. training	3,000,000	2,946,000
Total, voc/applied educ.	1,141,200,000	1,169,820,000
Adult education		
State programs	235,750,000	254,624,000
National programs	9,000,000	8,839,000
Literacy training for homeless adults	9,759,000	9,584,000
Workplace literacy partnerships	19,251,000	18,906,000
English literacy grants	1,000,000	—

	FY 1992 Comparable	**FY 1993 Final**
Commercial truck driver training	2,500,000	-
State literacy resource centers	5,000,000	7,857,000
Literacy program for prisoners	5,000,000	4,910,000
Total, adult education	287,260,000	304,720,000
TOTAL, VOCATIONAL AND ADULT EDUCATION	1,428,460,000	1,474,540,000
STUDENT FINANCIAL ASSISTANCE		
Pell Grants	5,472,350,000	5,997,690,000
Supplementary Ed. Op. Grants	577,000,000	585,280,000
Work-Study Grants	615,000,000	616,950,000
Income contingent loans	4,880,000	-
Perkins Loans		
Fed. capital contrib.	156,000,000	168,640,000
Loan cancellations	-	14,880,000
State Stud. Incentive Grants	72,000,000	72,555,000
TOTAL, STUDENT FINANCIAL ASSISTANCE	6,897,230,000	7,455,995,000
GUARANTEED STUDENT LOANS[10] (Costs for Stafford, PLUS, SLS loans, and including $10 million in FY 1993 to begin administration of the direct loan pilot program)		
Guaranteed Student Loans	2,639,812,000	2,930,158,000
(Liquidations/Shortfalls)	6,356,289,000	3,050,930,000

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[10] *Id.* at 3164 (the source of this break-out of Guaranteed Student loan costs, including liquidations and shortfalls).

	FY 1992 Comparable	FY 1993 Final
Loan Administration	43,870,000	42,496,000
TOTAL GUARANTEED STUDENT LOANS	9,039,971,000	6,053,584,000
HIGHER EDUCATION (Among the major programs receiving funding under this category are TRIO programs, graduate fellowships, institutional development, aid to historically black colleges, international studies, and cooperative education, along with many others.)		
TOTAL HIGHER EDUCATION	827,903,000	837,930,000
COLLEGE HOUSING AND ACADEMIC FACILITIES LOAN		
TOTAL	3,598,000	3,523,000
COLLEGE HOUSING AND ACADEMIC FACILITIES PROGRAM		
TOTAL	8,095,000	3,700,000
ED. RESEARCH, STATISTICS, AND ASSESSMENT		
Ed. Research	71,000,000	74,097,000
Statistics	47,300,000	48,906,000
National Assessment of Educ. Progress	30,000,000	29,601,000
Fund for Innovation in Education	24,000,000	23,709,000
Civic Education	3,800,000	4,346,000
Fund for Improvement and Reform Schools/Teaching	9,250,000	9,083,000

	FY 1992 Comparable	FY 1993 Final
Eisenhower Math/Science Education	16,000,000	15,872,000
Math-Science Consortium	12,000,000	13,590,000
Nat'l Diffusion Network	14,700,000	14,582,000
Blue Ribbon Schools	885,000	879,000
Javitz Gifted/Talented	9,732,000	9,607,000
Star Schools	18,412,000	22,816,000
Educ. Partnerships	4,233,000	4,157,000
Territorial Teacher Training	1,769,000	1,737,000
Leadership in Ed. Admin.	370,000	—
National Writing Project	2,500,000	3,212,000
National Board for Prof. Teacher Standards	4,880,000	4,792,000
TOTAL ED. RESEARCH, STATISTICS/ASSESSMENT	270,744,000	280,749,000
LIBRARIES		
TOTAL	147,247,000	146,069,000
PAYMENTS TO SPECIAL INSTITUTIONS		
TOTAL	334,239,000	318,604,000
DEPARTMENTAL MANAGEMENT		
TOTAL	371,412,000	391,003,000
TOTAL, EDUCATION DEPARTMENT	27,352,004,000	28,333,517,000

Federal Regulations

Among the key Department of Education regulations issued during 1992 that affect K-12 and higher education are the following:

Final Rule, Adult Education and Literacy Programs;[11]

Final Regulations, Even Start;[12]

Final Regulations, Carl D. Perkins Vocational and Applied Technology Education Act;[13]

Final Regulations, Part B of the Individuals with Disabilities Education Act (IDEA) and Correction to Final Rule,[14] (reprinted in Appendix);

Final Rule, Student Assistance General Provisions;[15]

Final Regulations, Special Educational Programs for Students Whose Families are Engaged in Migrant and Other Seasonal Farmwork—High School Equivalency Program (HEP) and College Assistance to Migrants Programs (CAMP);[16]

Final Rule, Perkins Loans, Work-Study Programs, SEOG (Campus-Based Programs).[17]

State Legislation

This section samples 1992 legislation across the fifty states. It does not pretend to be either exhaustive or comprehensive and does not cover higher education legislation, which generally was less reform minded than the 1992 public education legislation. The following synopses, however, do indicate the nature of many of the significant public education reform measures enacted during 1992. With an occasional exception, the following material does not refer to legislative enactments prior to 1992, but the reader should be aware that in the years immediately prior to 1992 many states enacted reforms under the various subheadings listed below. For further information, contact the state office of education in the pertinent state. Legislation is grouped thematically.

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[11] 57 Fed. Reg. 24084 (1992).

[12] 57 Fed. Reg. 27556 (1992).

[13] 57 Fed. Reg. 36720 (1992).

[14] 57 Fed. Reg. 44798 (1992) and 57 Fed. Reg. 48694 (1992).

[15] 57 Fed. Reg. 60032 (1992).

[16] 57 Fed. Reg. 60406 (1992).

[17] 57 Fed. Reg. 60700 (1992).

Accountability & Outcome-based Education

Outcome-based education (OBE) refers to goals or outputs measured in terms of student productivity and achievement that are to be achieved prior to graduation. It is contrasted to input-based education that focuses on teacher certification standards, teacher-pupil ratios, number of library books, etc. Minimum competency testing represented an earlier wave of accountability reforms that reflected dissatisfaction with input measures of educational performance. The past few years have seen a new wave of legislation emphasizing results-oriented accountability standards. Current legislative measures target not only a change in learner outcomes from course credits to specific knowledge outcomes but also changes in the measures of student performance (see assessment) and introduction of outcome-based schools (see charter schools). Among the states whose legislatures initiated OBE reforms prior to 1992 are Oklahoma, Kentucky, Minnesota, Oregon, and Florida.

As part of a larger educational reform package, the 1992 **Kansas** Legislature enacted provisions requiring the development of outcome measures and school site councils to advise each school on methods to achieve better outcomes, among other things.[18] In addition, the state adopted a "quality performance accreditation" system to evaluate the performance of individual schools on ten learning outcomes by 1995-96.

The 1992 **Nebraska** Legislature created a statewide system of accountability for determining learning outcomes, managed by the Nebraska Schools Accountability Commission.[19] The Commission is to develop broad curriculum frameworks and standards for learner outcomes. Subsequently, it is to develop a reliable, accurate, and educationally sound system of assessing student progress toward the achievement of those outcomes (see assessment).

The 1992 **Minnesota** Legislature committed itself to a "results-oriented" graduation rule rather than completion of a given number and set of courses.[20] The state board of education is required to submit reports in both 1993 and 1994 on the process of adopting a final results-based graduation rule after July 1, 1994.

In 1992 the **Pennsylvania** Board of Education adopted statewide learner outcomes whereby students will be required to meet approximately sixty goals in areas such as math, science, English, information and thinking skills, self-worth, independent and collaborative learning, and ethical judgment. The 1992 legislature challenged the Board's approach and adopted a resolution urging delay in the issuance of the

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[18] 1992 Kan. Adv. Leg. Serv. 280.
[19] 1992 Neb. Adv. Leg. Serv. 245.
[20] 1992 Minn. Adv. Leg. Serv. 499.

Board's learner outcomes.[21] Controversy has arisen over what some see as potentially problematic "values."

As a part of its statutory restructuring of its education system, **Washington** enacted a measure directed at improving learning outcomes by initiating a performance-based accountability system.[22] The legislature provided for the creation of the Washington Commission on Student Learning and instructed it to report to the legislature by December 1, 1995 and December 1, 1996 on the development of elementary and secondary school student assessment systems respectively. The 1996 date also applies to the development of a school accountability system. Moreover, for schools or school districts submitting a plan for restructuring their educational program to achieve higher standards, requirements for the self-study process, program hour offerings, and teacher classroom contact will be waived, with certain restrictions.

Assessment of Students

Most states initiating OBE reforms are interested in broadening their student assessment programs to include not only standardized, norm-referenced achievement tests at various grade levels but also so-called "authentic assessment" measures. Authentic assessment measures include such informal measures as work samples organized into student portfolios, audio and video performance tapes, open-ended and essay questions, teacher observations, and the like.

In 1992 **Hawaii** amended its 1991 education reform statute to require the Commission on Performance Standards to consider "results-driven" assessment and to develop a model for future assessment on a school-by-school basis.[23] The amended statute requires the Commission to submit a report prior to the 1994 legislative session on the means of assessing educational achievement. The earlier 1991 statute established the Commission and required it to set performance standards and to recommend assessment procedures. The Commission was instructed to consider performance standards that balance direct measures of achievement with indirect measures such as writing samples, portfolios, open-ended and essay questions, demonstrations, experiments, individual or group projects, or multiple choice tests.[24]

Major reforms in **Kansas** call for introduction of measurable student goals or learning outcomes, and multiple assessments of student progress toward meeting those goals.[25] Three benchmark assessment levels are to be established, emphasizing higher order thinking skills and assessing mathematics, science, communications (reading, writing, speaking, and listening), and social studies (including American history and geography). Standards are to be in place by July 1993.

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[21] *See* Diegmuller, *Critics Assailed as Pa. Panel Approves Outcome Rules*, XI EDUCATION WEEK 31, April 22, 1992, at 27.

[22] 1992 Wash. Adv. Leg. Serv. 141.

[23] 1992 Haw. Adv. Leg. Serv. 295.

[24] 1991 Haw. Adv. Leg. Serv. 334.

[25] 1992 Kan. Adv. Leg. Serv. 280.

As part of its restructured accountability system, the **Nebraska** schools are under a 1992 legislative mandate to develop "a system of authentic assessment in math, science, reading, language arts, and social studies."[26] The Accountability System is to be completed by July 1, 1996.

Ohio eliminated its differentiated diploma system, which was enacted several years earlier in an attempt to increase student achievement. Under the new legislation, the system will be replaced with a traditional single diploma system with recognition for honor graduates.[27] The repealed law had linked four separate kinds of diplomas to scores on ninth grade or twelfth grade competency tests. The new law will replace most achievement tests and ability exams with criterion-referenced proficiency tests in reading, writing, mathematics, science, and citizenship.

The **Oklahoma** Legislature revised the state's educational testing program.[28] It reduced the grades in which a norm-referenced test of learning achievement must be given; rather than administering the test annually in grades three, five, seven, nine, and eleven, the tests will be given in grades three and seven beginning with the 1994-95 school year. The state's criterion-referenced test for high school graduation was put on hold, and the Board of Education was ordered to develop a series of criterion-referenced tests for fifth, eighth, and twelfth grades designed to indicate whether competencies expected of Oklahoma students have been mastered. The new series of tests is to be designed and implemented to correlate with the implementation of Oklahoma's previously adopted outcome-based curriculum standards. Staged implementation will occur between 1994 and 1999.

In 1992, **Tennessee**, as part of a its comprehensive "Education Improvement Act" adopted amendments to its evaluation system requiring annual grade-level assessments in each grade.[29] The school district assessments are to demonstrate "significant progress" toward mean rates of gain equal to or greater than national norms on which the Tennessee Comprehensive Assessment Program (TCAP) or other academic performance tests are based. Failure to show such progress can result in district probation. The Act mandates specific statistical procedures in an attempt to measure the "value [of instruction] added" by the teacher, the school, and the school district. The effect of a given teacher's instruction

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26. 1992 Neb. Adv. Leg. Serv. 245.
27. 1992 Ohio Leg. Serv. HB 55 (Baldwin).
28. 1992 Okla Adv. Leg. Serv. 292.
29. 1992 Tenn. Adv. Leg. Serv. 535.

will not be made public. In addition to these grade-level assessments, school officials are to design a new high school Comprehensive Assessment Program test, as well as an exit examination to assess readiness for the workplace or higher education.

Charter Schools

In 1991 **Minnesota** became the first state in the country to enact legislation authorizing "Outcome-based Schools," also known as Charter Schools.[30] In 1992 an effort to repeal the legislation failed.[31] The legislation authorizes up to eight schools operated by state-licensed teachers after obtaining local school board chartership and approval of the State Board of Education. Approval to become an outcome-based school may be given to a private, nonsectarian school as well as a public school. An outcome-based school is exempt from statutes and rules governing school districts, with the exception of health and safety requirements, discrimination laws, rules relating to the education of students with disabilities, student fee and student dismissal statutes, and financial auditing requirements.

California, in September 1992, enacted its own Charter Schools legislation authorizing the creation of 100 such schools across the state—up to ten per district.[32] Under the law, the schools must be public schools and will receive public funding. Initial charters will be for five years, rather than the three-year contracts provided for under the Minnesota law. Similar to the Minnesota law, the California charter schools will concentrate on student outcomes and will enjoy a significant degree of autonomy and freedom from regulatory requirements. They will also have substantial control over employee qualifications and choice of retirement systems. Racial and ethnic balance reflective of the general population of the school district must be achieved. The emphasis on student outcomes is referred to in the law as "performance-based" accountability, in contrast to more traditional "rule-based" accountability. The State Department of Education must review and evaluate the Charter School approach and provide recommendations regarding it to the Legislature by January 1, 1999.

Class-size Reduction

During the 1992 legislative session **Alaska** passed a law establishing a four-year, elementary school class-size-reduction pilot program.[33] Included in the program are measures to establish the effect of class-size reductions on test scores, school discipline, teacher innovation, and parent involvement in education. A school district is eligible to propose an elementary school in its district as a pilot school if the average pupil-teacher ratio in the basic classrooms of the school is greater than 25:1. Schools selected to participate then must maintain a pupil-teacher ratio of no more than 15:1 for grades K-4, and attempt to maintain a ratio of no more than 21:1 in grades 5-6 during the years of the program. Additional state aid is to be made available to implement the program.

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[30] 1991 Minn. Adv. Leg. Serv. 265.

[31] Source: Bill Marx, Minnesota Office of Legislative Research.

[32] 1992 Cal. Adv. Leg. Serv. 781 (Deering).

[33] 1992 Alaska Adv. Leg. Serv. 135.

Corporal Punishment/Use of Force

Amending its previously enacted corporal punishment prohibition, the 1992 **Michigan** Legislature clarified that teachers may use reasonable physical force in order to "maintain order and control."[34] Teachers may use such force in the following situations: to defend oneself or another from harm, to prevent self-injurious behavior by a student, to quell a disturbance that threatens physical injury, to obtain possession of a dangerous object, to protect property, and to restrain or remove a disruptive student who has refused to comply with a request to refrain from further disruptive acts. The 1992 legislation also provides that the Department of Education shall develop a model list of alternatives to corporal punishment and make it available to requesting districts or nonpublic schools.

The 1992 **Utah** Legislature enacted a law prohibiting the use of corporal punishment against students in public and private schools without the consent of the parents.[35] Subsequent to its enactment, the Utah Board of Education adopted a policy prohibiting corporal punishment in the public schools even with parental consent.

Crime Prevention/Violence Prevention

Minnesota enacted a lengthy crime bill that includes money for education programs designed to prevent or reduce the extent of violence.[36] Among programs in which schools may participate are: a parent education early childhood program (including home visits and teacher training) to prevent child abuse and neglect; a grant program for schools to develop violence prevention programs; and an appropriation for cities, counties, and school districts to establish community councils targeted at preventing violence.

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[34] 1992 Mich. Adv. Leg. Serv. 6.
[35] 1992 Ut. Adv. Leg. Serv. 251.
[36] 1992 Minn. Adv. Leg. Serv. 571.

Early Primary Programs

With the understanding that establishment of "integrated, experiential, and developmentally appropriate" early primary programs for preschool through grade 3 would have only minimal financial implications for the **California** education system, the governor signed a bill authorizing the establishment of such programs.[37] Under the law, a school district is authorized to establish early primary programs to accomplish a number of reform objectives: a reduction in academically oriented, paper and pencil seat work in preschool and kindergarten programs and an increase in "hands-on," concrete manipulative materials and "active learning" focusing on oral language development; drastic reduction in standardized testing instruments, and substitution of observation and authentic assessment relying on portfolio material; increased parental education and involvement; heterogenous groupings and small-group instruction; and connections with interagency children's services coordinating councils, the Demonstration in Restructuring of Education programs, and other early childhood programs such as Head Start and state preschool and child development programs. Classes may be ungraded or may contain same-age pupils. Kindergarten programs may exceed the current four-hour day if both active and quiet activities are undertaken, and if the length of the day does not exceed the length of the primary school day.

Kentucky legislation passed in 1992 enhanced earlier legislation requiring the development of procedures for developing an ungraded primary program.[38] Under the 1992 amendments, administrative regulations are to be promulgated and the program is to be fully implemented for all students below the fourth grade by the beginning of the 1993-94 school year. The program is to include "developmentally appropriate education practices; multi-age and multi-ability classrooms; continuous progress; authentic assessment; qualitative reporting methods; professional teamwork; and positive parent involvement."

Tennessee's Education Improvement Act specifies that the state board shall adopt rules allowing local school districts to operate "ungraded or unstructured" K-3 classes.[39] In addition, each local school district must establish and maintain a kindergarten program.

Finance

At the November 1992 elections **Colorado** voters approved an initiative that curtailed government spending and made it harder to raise taxes. Without voter approval, school spending increases now cannot exceed the rate of inflation plus increases in population growth, school enrollment, or the property tax base. Simultaneously, the voters defeated a proposed one cent increase in the sales tax that would have gone to support the public schools.[40]

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[37] 1992 Cal. Adv. Leg. Serv. 1082 (Deering).

[38] 1992 Ky. Adv. Leg. Serv. 362.

[39] 1992 Tenn. Adv. Leg. Serv. 535.

Connecticut enacted amendments to its school formula-funded equalization program to reduce the disparity between rich and poor school districts.[41] Under a ranking program of district wealth, twenty of the state's wealthiest communities are in a position to lose up to 80% of their state aid.

Florida voters approved a constitutional amendment limiting increases in property valuations to 3% each year and requiring assessment of market values when ownership changes.[42]

The **Georgia** Legislature passed a state "Lottery for Education Act"[43] that was ratified by voters in the November 1992 general election.[44] Net proceeds of lottery games under the statute must be used to supplement, not supplant, existing resources for educational purposes and programs. The definition of educational purposes and programs covers capital outlay projects for educational facilities; tuition grants, scholarships, or loans for Georgia citizens to attend postsecondary educational institutions within the state; voluntary pre-school programs, and an education shortfall reserve. Georgia also amended the calculation of its equalization grants.[45]

Iowa has a new mechanism for determining the allowable growth in school spending.[46] Heretofore, stated education spending had been set by a formula that automatically allowed school funding to increase by set amounts. A 1992 law ended the automatic spending increases. Instead, the legislature is to settle on the percent of education spending growth within thirty days of the date on which the governor presents annual budget recommendations to the legislature.

In a major restructuring of its school finance system, **Kansas** replaced its "power equalization" school funding formula with a new law entitled the School District Finance and Quality Performance Act.[47] The Act is designed to reduce financing inequities across districts and to reduce the influence of variations in the property tax base. State sales and income tax rate changes help to provide property tax relief. The Kansas base budget is set at $3,600 per pupil, with the state making up the difference between a school district's local effort and the base budget. Districts raising an amount over the base budget must remit the excess to the state to help finance general state aid to the districts. Discretionary, local option funding is also subject to an equalization formula, as is state assistance to school districts for their bond and interest payments.

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[40] *See Highlights of Ballot Proposals*, XII EDUCATION WEEK 10, Nov. 11, 1992, at 19.
[41] 1992 Conn. Adv. Leg. Serv. 262.
[42] *See supra* note 40.
[43] 1992 Ga. Adv. Leg. Serv. 1417.
[44] *See supra* note 40.
[45] 1992 Ga. Adv. Leg. Serv. 1015.
[46] 1992 Iowa SF 2351.
[47] 1992 Kan. Adv. Leg. Serv. 280.

Maryland legislators passed a controversial measure shifting the employer's share of Social Security taxes for school employees entirely to local communities.[48] Prior to the change, the state paid a significant part of the employer's social security contribution. As a result, wealthy districts that could afford to pay higher salaries to their teachers were able to pass on the concomitant higher social security costs to the state. Seen as a cost-saving device for states as well as a means to bring more equity to education finance, the new law will force local governments to weigh the amount of social security they will now owe as a result of any pay raise to teachers.

Minnesota modified and funded a debt service equalization program that had been passed in 1991 but not funded.[49] It also established a new funding formula framework to take effect in 1999-2000 in which basic outcome funding would be state funded, elective instructional revenue would be fully equalized, and local discretionary revenue would be capped and equalized.

Mississippi and **Nebraska** voters amended their constitutions to allow state lotteries for educational purposes.[50] In addition, the Mississippi Legislature overturned a gubernatorial veto of a bill that raised the state sales tax from 6% to 7% to support public education.[51]

Ohio adopted a finance redistribution measure to aid poorer school districts, to transfer $5 million from the school district equity appropriation to a technology equity program (see technology initiatives), and to appropriate $1.25 million for joint vocational school equalization.[52] The act uses a ranking of districts based on per-pupil expenditures, property value, and residential income as a basis for redistributing funds to school districts in the bottom third of the ranking.

Tennessee's 1992 education reform measure will reduce the funding gap between rich and poor school districts.[53] The state is to provide 75% of the funds generated by the Tennessee Basic Education Program formula in classroom components and 50% in nonclassroom components. From the local funding portion, a distribution "for equalization purposes" is to be made pursuant to a formula devised by the state Board of

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[48] 1992 Md. Adv. Leg. Serv. 1.

[49] *See* 1991 Minn. Adv. Leg. Serv. 265 and 1992 Minn. Adv. Leg. Serv. 499.

[50] *See supra* note 40.

[51] 1992 Miss. Adv. Leg. Serv. 419.

[52] 1992 Ohio Leg. Serv. HB 671 (Baldwin).

[53] 1992 Tenn. Adv. Leg. Serv. 535.

Education.

Utah enacted a phased-in school district equalization program for capital outlay and debt service—to supplement its already equalized maintenance and operation program.[54] In order to qualify for equalization monies under the new law, a school district must impose a minimum basic tax rate for capital outlay and debt service and be below the state's average yield per student on that rate. The formula for redistribution of the monies raised will partially protect districts with heavy debt until the debt is reduced. The state will contribute to the equalization program using monies from the Uniform School Fund.

Finally, voters in **California**, **New Mexico**, and **Virginia** approved statewide school bond measures authorizing $900 million, $76.9 million, and $474 million respectively for capital improvements.[55]

Governance

A number of states made changes in the structure or the method of selection of state or local education boards. **Georgia** voters approved a constitutional amendment providing for the election of local school boards and the appointment of local school superintendents by their boards, beginning in 1994.[56] A measure adopted in **Hawaii** gives voters the option to amend their state constitution to allow the governor to appoint the state board of education (currently elected) and the superintendent (currently appointed by the state board).[57] (See also site-based decision making.) **Illinois** abolished the regional board of school trustees in educational service regions having two million or more inhabitants.[58] Their role was assumed by the trustees of schools of each township included within the region or, in certain instances, by the school board of each school district within the township. **Tennessee**'s education reform law, among other things, calls for the end of elected school superintendents by the end of the decade.[59] Finally, **Virginia** enacted a law allowing local jurisdictions to elect local school boards.[60] Until 1992 Virginia had remained the only state in the country in which all school boards had to be appointed.[61]

In other actions, Kentucky and Missouri moved to strengthen the role of the state office of education *vis a vis* local school districts. **Kentucky** amended its statutes to allow the state board of education not only to establish "state assisted" but "state managed" school districts under circumstances where a management audit confirms a "pattern of a significant lack of efficiency and effectiveness in the governance or administration of a school district."[62] Inadequate development or implementation of a correctional plan will result in a district moving from a "state assisted" to a "state managed" district. Kentucky voters also approved a proposed constitutional amendment removing the Superintendent of Public Instruction from among those who are elected to office.[63]

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[54] 1992 Ut. Adv. Leg. Serv. 292.

[55] *See supra* note 40.

[56] *Id. See also*, 1992 Ga. Adv. Leg. Serv. 288.

[57] 1992 Haw. Adv. Leg. Serv. 294.

[58] 1992 Ill. Adv. Leg. Serv. 969.

[59] 1992 Tenn. Adv. Leg. Serv. 535.

[60] 1992 Va. Adv. Leg. Serv. 594.

[61] *See Legislative Update: Virginia*, XI EDUCATION WEEK 37, June 3, 1992, at 21.

Missouri passed a law allowing the state Board of Education to identify and assist financially troubled school districts.[64] The act authorized the state Board to reassign students from financially districts unable to provide the minimum required school year. The act also gives the state Board the authority to place and consolidated questions before voters. An additional governance change adds a seventh member to six-member boards of education beginning with 1993 elections, a move that will allow a three-to-three tie to be broken by a board member rather than the presiding county commissioner. Many Missouri educators see the finance provisions of this act as a stop-gap until more fundamental revisions in the state school finance formula can be made.

Home Schooling

South Carolina amended its home schooling requirements to allow exemptions from its basic regulations if parents join and comply with the academic standards of the South Carolina Association of Independent Home Schools.[65] Minimum requirements for membership in the Association include an instructional year of 180 days and a curriculum including reading, writing, mathematics, science, and social studies, plus composition and literature in grades seven-to-twelve. Additionally, a parent must hold a high school diploma or GED certificate.

Length of School Year

Following a trend established by Minnesota and Oregon in 1991, **Kansas** enacted a law increasing the 180-day school year in stages until it reaches 186 days in 1995-96.[66] (In 1991 Minnesota voted to increase its instructional days beginning in 1995-96 by two days a year for each of the next 10 years,[67] while 1991 Oregon legislation calls for gradually increasing the length of the school year to 220 days by 2010.[68])

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[62] 1992 Ky. Adv. Leg. Serv. 184.

[63] *See supra* note 40 and 1992 Ky. Adv. Leg. Serv. 168.

[64] 1992 Mo. Adv. Leg. Serv. 581.

[65] 1992 S.C. Acts 313.

[66] 1992 Kan. Adv. Leg. Serv. 280.

Merit Pay

The **Georgia** Legislature enacted a "pay-for-performance" program requiring the State Board of Education to develop performance criteria to reward group productivity in improving student outcomes and achievement on a school-wide basis.[69]

Miscellaneous

Georgia enacted a law requiring that parents must provide an official copy of their child's social security number to proper school authorities for incorporation into the official school records. A parent who objects may have the requirement waived.[70] **New Jersey** enacted a law requiring all new school buses to have seat belts and higher seat backs to help prevent injuries.[71] New Jersey is thought to be the first state in the nation to mandate seat belts on buses.[72]

Multicultural Education

Florida increased its commitment to multicultural education under 1992 amendments to existing law. The Florida Commission on Educational Reform and Accountability is charged with assessing the performance of students in various cultural groups and recommending statutory and regulatory changes to assure sufficient multicultural education to meet the needs of Florida's diverse student population.[73] Multicultural education must be included in inservice training activities undertaken by state and local education agencies. The State Instructional Materials Committees must include members with the expertise to address multicultural issues, and the membership must reflect the racial, ethnic, socioeconomic, and cultural diversity of the state.

Nebraska adopted a multicultural law requiring each school district to develop a multicultural education program and incorporate it into all phases of its K-12 curriculum beginning in the 1993-94 school year.[74] If a school district does not comply, it "shall" lose its accreditation status. In conjunction with the program, the state Department of Education must

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67. 1991 Minn. Adv. Leg. Serv. 265.
68. 1991 Or. Adv. Leg. Serv. 693.
69. 1992 Ga. Adv. Leg. Serv. 1416.
70. 1992 Ga. Adv. Leg. Serv. 1223.
71. 1992 N.J. Adv. Leg. Serv. 92.
72. *See Seat Belts Required on N.J. School Buses*, XII EDUCATION WEEK 2, Sept. 16, 1992, at 21.
73. 1992 Fla. Leg. Serv. 100.
74. 1992 Neb. Adv. Leg. Serv. 922.

design an "authentic assessment system to assess student cultural awareness and sensitivity." Multicultural education is defined under the act as including, but not limited to "studies relative to the culture, history, and contributions of African Americans, Hispanic Americans, Native Americans, and Asian Americans."

Parent Outreach and Involvement

A 1992 **Iowa** law established a Family Resource Center demonstration program—a cooperative venture by the Department of Education and the Child Development Coordinating Council.[75] The program is to begin with at least three school-based resource centers to provide comprehensive child development and child care services, along with remedial educational and literacy services to parents receiving Aid to Families of Dependent Children (AFDC) and others. Grant applications from schools will be prioritized based on the criticality of identified community social welfare needs, using measures such as infant mortality rate, teenage pregnancy rate, number of single-parent families living below poverty guidelines, lack of affordable child care, and illiteracy rate. Each resource center must provide child development and education services, child day care using a sliding fee scale, support services to parents of newborn infants, educational services for parents whose children participate in the child care program, and training to family day care providers in the community. The school district is to be the primary decision maker in any partnership established to create a family resource center. If possible, the centers are to be located in school buildings. Establishment of the centers is to begin July 1, 1993.

Iowa also enacted a Family Support Program to assist expectant parents and parents of children from birth through age five to learn about the physical, mental, and emotional development of their children.[76] School districts may opt to develop and offer such a program to eligible parents who reside within their district boundaries. The family support program educator must have completed a minimum of thirty clock hours of an approved training program and meet other licensing or experience requirements. The act takes effect July 1, 1993. Teachers demonstrating superior performance in family support programs are eligible for performance-based pay increases.

Minnesota amended its school district planning, evaluation, and reporting (PER) requirements by requiring school boards to establish a procedure for a parent, guardian, or student over the age of eighteen who wants to review the content of classroom instructional materials.[77]

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[75] 1992 Iowa HF 2467.
[76] 1992 Iowa HF 2167.

The law allows the parent, guardian, or student to make reasonable arrangements for alternative instruction if there are objections to the content. The school board is not required to pay for the alternative instruction if it is provided by the parent, guardian, or adult student. School personnel, however, may evaluate and assess the quality of any alternative work.

Sex Education

South Dakota amended its curriculum requirements to include moral and character instruction "intended to impress upon the minds of students the importance of . . . sexual abstinence. . . ."[78]

Site-based Management

Many states have already incorporated site-based management into school reform laws. It became popular in the 1980s and stressed the decentralization of school decision-making to the school building level and the involvement of parents and teachers in decision-making. Charter schools are one form of site-based decision making.

Hawaii enacted 1992 amendments to its earlier school/community-based management statute that furthered the process of decentralization in the state's centralized education system.[79] One amendment allows school/community-based management councils to provide "input" into the selection process for school personnel. Also, the state education department is asked to develop a plan detailing how schools can assume control over their own budgets.

Tennessee now has a provision allowing any local school district to define its procedures for school-based decision making and designate any areas (e.g., instruction, curriculum, personnel) to be decided by personnel at the school.[80] The legislature specifies a collaborative approach to decision making, and allows school-based decisions to vary from local board policies but not from requirements of law.

Special Education

Iowa enacted a 1992 law requiring public school districts to be responsible for the provision of educational services to children residing in a psychiatric unit of a licensed hospital or psychiatric medical institution not operated by the state.[81] Children residing in such settings are to

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77. 1992 Minn. Adv. Leg. Serv. 496.
78. 1992 So. Dak. Adv. Leg. Serv. 119.
79. 1992 Haw. Adv. Leg. Serv. 295.
80. 1992 Tenn. Adv. Leg. Serv. 535.

be included in the basic enrollment of their school districts of residence. Those school districts are to pay the school district within which the psychiatric hospital/institution is located the pro-rated district educational cost per pupil for the time spent in the hospital or institutional setting. Some of the children residing in these settings will be special education students; others may not be, so the source of the district's funding may vary accordingly.

New Hampshire revised its special education law to enable the state Department of Education to cover more of the "catastrophic" cost increases associated with residential placements of special education students.[82] The local school district is liable for three-and-a-half times the state average cost per pupil, plus 20% of the additional cost. The Department of Education is responsible for the other 80% additional cost, up to ten times the estimated average per pupil expenditure. Above that amount, the Department of Education assumes all liability.

Teacher Certification and Evaluation Requirements

The 1992 **California** Legislature amended earlier legislation requiring an evaluation of alternative methods to locally support and assess beginning teachers.[83] Among other things, the amendments created "The California Beginning Teacher Support and Assessment Program," to be administered jointly by the Commission on Teacher Credentialing and the Superintendent of Public Instruction. The intent of the program is to assist teachers in the first and second years of teaching to attain acceptable levels of professional competence and to ensure the retention of promising new teachers. Performance assessments are to be developed for teacher development purposes, and these assessments may not be used as a basis for terminating employment.

Indiana enacted a law that gives teachers majority control of the state's Professional Standards Board, which governs teacher certification and licensing programs.[84] Under the new law, nine of the sixteen members of the board will be teachers. Among them, the nine teachers must represent pre-school, elementary, middle/junior high, and high school as well as all major curriculum areas, including special education and vocational education. Other members of the Board include a parent, a principal, a superintendent, three representatives of teacher training institutions, and the state superintendent.

In 1991 **Louisiana** passed a law requiring the state Department of

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81. 1992 Iowa SF 2320.
82. 1992 N.H. Adv. Leg. Serv. 238.
83. 1992 Cal. Adv. Leg. Serv. 1422 (Deering).
84. 1992 Ind. Adv. Leg. Serv. 46.

Education to develop, promulgate, and monitor the implementation of uniform teacher competency guidelines.[85] Standards of effective teaching performance were to have been submitted to local school boards by December 31, 1992. The 1992 amendments state that, except for research and validation purposes, evaluation or assessment of teachers under the new act shall not take effect until the 1994-95 school year, after pilot testing of all aspects of the assessment program. Under the plan teachers with permanent status must be evaluated at least every third year. Any district wishing to hire a person who has been evaluated must request the evaluation results as part of the application process. The applicant may have access to the information received and may respond to it.[86]

Minnesota enacted a law requiring the state Board of Education to adopt rules requiring teachers to pass an examination of their knowledge and teaching skills prior to licensure.[87] The rules are to be in effect no later than July 1, 1999. In addition, the legislature instructed the state Board of Teaching to develop pilot projects requiring full year internships at professional development schools prior to granting teacher licenses.

Teacher Rights

The **Alaska** Legislature overrode a gubernatorial veto and enacted a law giving public school employees a permanent right to strike after advisory arbitration.[88]

New Mexico enacted a law allowing collective bargaining by public school teachers.[89] An election to consider unionization must be held at the request of at least 30% of a potential bargaining unit's membership. The law, however, makes strikes illegal and contains no provision for binding arbitration. It also contains a sunset provision scheduled to take effect on July 1, 1999.

Technology Initiatives

Georgia's Distance Learning and Telemedicine Act of 1992 provides for an extensive telecommunications network for educational and medical purposes.[90] Fifty million dollars will be available for distance learning with live interactive capability to link rural schools and urban colleges and universities. The Legislature envisages teacher training programs via interactive television, as well as education programs beamed into individual homes.

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[85] 1991 La. Adv. Leg. Serv. 3256.
[86] 1992 La. Adv. Leg. Serv. 506.
[87] 1992 Minn. Adv. Leg. Serv. 499.
[88] 1992 Alaska Adv. Leg. Serv. 1.
[89] 1992 N.M. Adv. Leg. Serv. 9.
[90] 1992 Ga. Adv. Leg. Serv. 659.

Kentucky's 1990 school reform act mandated a major technology initiative to equip every classroom with computers and link all the schools in the state electronically.[91] The 1992 Legislature appropriated $15 million (far less than originally intended) during the two-year budget cycle to begin implementation of the six-year $400 million plan approved by the Kentucky Council for Educational Technology.[92]

An **Ohio** technology equity law requires surveys of school districts to detail school access to and ability to use televisions, video cassette recorders, cable, computers, and other related technology.[93] Grants are to be made to the Ohio Educational Broadcasting Network Commission for production of interactive instructional programming targeted initially to the needs of the 200 poorest school districts.

Vouchers (Choice/Open Enrollment Programs)

In the November 1992 general election **Colorado** voters rejected a proposal that would have provided vouchers for parents to send their children to either public or private schools.[94]

Tennessee's 1992 education reform measure authorizes students throughout the state to select the public school of their choice.[95] Outside the normal school zone, however, students may be required to transport themselves.

Work Force Development Programs

Indiana enacted an ambitious work force development act in 1992.[96] The law requires the development of a "gateway test" at the tenth grade level, which students must pass in order to graduate. After passing the exam, students are to develop career plans based on either a college-preparatory or a vocational/technology preparatory curriculum. The tech-prep curriculum is to be in place for all Indiana secondary students by the 1994-95 academic year. State versions of the College Board's Advanced Placement exams are being developed in technical areas. Both the tech-prep and college-prep curriculum must meet entry-level requirements for the state's colleges and universities.

As part of its ongoing school transformation program, the 1992 **Iowa** Legislature established a community-based workplace learning program entitled "Workstart."[97] The program is meant to provide participating high school students with both the academic skills and the appropriate, competency-based, job-specific skills needed for high performance workplace employment. The program anticipates voluntary collaboration by Iowa businesses with secondary and postsecondary education systems. Participating businesses will enter into written agreements with education agencies to provide workplace-specific training and are expected to support the Workstart program with financial and in-kind support. In establishing and operating the program, the accreditation standard and process for vocational education in grades 9-12 need not be followed.

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[91] 1990 Ky. Adv. Leg. Serv. 476.

[92] 1992 Ky. Adv. Leg. Serv. 462.

[93] 1992 Ohio Leg. Serv. HB 671 (Baldwin).

[94] *See supra* note 40.

[95] 1992 Tenn. Adv. Leg. Serv. 535.

[96] 1992 Ind. Adv. Leg. Serv. 19.

The 1992 **Tennessee** Legislature did away with the "general education track" in high school and requires students to select either a revised and strengthened vocational-technical program or a college-prep program, with enhanced counseling efforts to help students with postsecondary plans."[98]

Conclusion

With the exception of the reauthorization of the Higher Education Act of 1965, 1992 was a quiet year in terms of national education enactments. The most prominent state reform efforts in public education centered around issues such as funding equity to decrease the disparity between wealthy and poor school districts, outcome-based and accountability/assessment issues, technology applications and increased vocational training in the schools, parental involvement, and continuing decentralization of school decision making. Although not itemized or analyzed in this chapter, budgetary problems from a recessionary economy affected implementation of previously enacted reforms in many states and curtailed enactment of new reforms in other states.

An area not highlighted by 1992 legislation, but worth watching in the future, is that of collaboration and interagency cooperation to serve the multiple educational, health, and social service needs of students at risk. A number of states have efforts underway to deliver such multi-disciplinary services, with the school as the central point for the identification of needs.

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[97] 1992 Iowa HF 2287.

[98] 1992 Tenn. Adv. Leg. Serv. 535.

FEDERAL REGULATIONS: PART B OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

34 CFR PART 300—ASSISTANCE TO STATES FOR THE EDUCATION OF CHILDREN WITH DISABILITIES

(As amended through March 11, 1993)*

***This material was placed on disc for NOLPE by Joan Christensen, Stephanie Gordon, Kathy Dye Spaller, Dixie Snow Huefner, and Stephen B. Thomas.**

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Authority: 20 U.S.C. §§ 1411-1420, unless otherwise noted.

Subpart A—General

Purpose, Applicability, and Regulations That Apply to this Program

§ 300.1 Purpose.

The purpose of this part is—

(a) To ensure that all children with disabilities have available to them a free appropriate public education that includes special education and related services to meet their unique needs;

(b) To ensure that the rights of children with disabilities and their parents are protected;

(c) To assist States and localities to provide for the education of all children with disabilities; and

(d) To assess and ensure the effectiveness of efforts to educate those children.

(Authority: 20 U.S.C. § 1401 Note)

§ 300.2 Applicability to State, local and private agencies.

(a) *States.* This part applies to each State that receives payments under Part B of the Act.

(b) *Public agencies within the State.* The State plan is submitted by the State educational agency on behalf of the State as a whole. Therefore, the provisions of this part apply to all political subdivisions of the State that are involved in the education of children with disabilities. These would include:

(1) The State educational agency;

(2) Local educational agencies and intermediate educational units;

(3) Other State agencies and schools (such as Departments of Mental Health and Welfare and State schools for students with deafness or students with blindness); and

(4) State correctional facilities.

(c) *Private schools and facilities.* Each public agency in the State is responsible for ensuring that the rights and protections under this part are given to children referred to or placed in private schools and facilities by that public agency. (See §§ 300.400-300.402)

(Authority: 20 U.S.C. §§ 1412(1), (6); 1413(a); 1413(a)(4)(B))

Note: The requirements of this part are binding on each public agency that has direct or delegated authority to provide special education and related services in a State that receives funds under Part B of the Act, regardless of whether that agency is receiving funds under Part B.

§ 300.3 Regulations that apply.

The following regulations apply to this program:

(a) 34 CFR part 76 (State-Administered Programs) except for §§ 76.780-76.782.

(b) 34 CFR part 77 (Definitions).

(c) 34 CFR part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(d) 34 CFR part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments).

(e) 34 CFR part 81 (General Education Provisions Act—Enforcement).

(f) 34 CFR part 82 (New Restrictions on Lobbying).

(g) 34 CFR part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for a Drug-Free Workplace (Grants)).

(h) 34 CFR part 86 (Drug-Free Schools and Campuses).

(i) The regulations in this part—34 CFR part 300 (Assistance to States for Education of Children with Disabilities).

(Authority: 20 U.S.C. § 1221e-3(a)(1))

Definitions

Note 1: Definitions of terms that are used throughout these regulations are included in this subpart. Other terms are defined in the specific subparts in which they are used. Below is a list of those terms and the specific sections in which they are defined:

Appropriate professional requirements in the State (§ 300.153 (a)(1))
Average per pupil expenditure in public elementary and secondary schools in the United States (§ 300.701(c))
Consent (§ 300.500)
Destruction (§ 300.560)
Direct services (§ 300.370(b)(1))
Education records (§ 300.560)
Evaluation (§ 300.500)
First priority children (§ 300.320(a))
Highest requirements in the State applicable to a specific profession or discipline (§ 300.153(a)(2))
Independent educational evaluation (§ 300.503 (a)(3)(i))
Individualized education program (§ 300.340)
Participating agency, as used in the IEP requirements in §§ 300.346 and 300.347 (§ 300.340(b))
Participating agency, as used in the confidentiality requirements in §§ 300.560-300.576 (§ 300.560)
Party or parties (§ 300.584(a))
Personally identifiable (§ 300.500)
Private school children with disabilities (§ 300.450)
Profession or discipline (§ 300.153(a)(3))
Public expense (§ 300.503(a)(3)(ii))
Second priority children (§ 300.320(b))
Special definition of "State" (§ 300.700)
State-approved or recognized certification, licensing, registration, or other comparable requirements (§300.153 (a)(4))
Support services (§ 300.370(b)(2))

Note 2: Below are abbreviations for selected terms that are used throughout these regulations:

"FAPE" means "free appropriate public education."
"IEP" means "individualized education program."
"IEU" means "intermediate educational unit."
"LEA" means "local educational agency."
"LRE" means "least restrictive environment."
"SEA" means "State educational agency."

As appropriate, each abbreviation is used interchangeably with its nonabbreviated term.

§ 300.4 Act.

As used in this part, "Act" means the Individuals with Disabilities Education Act, formerly the Education of the Handicapped Act.

(Authority: 20 U.S.C. § 1400)

§ 300.5 Assistive technology device.

As used in this part, "assistive technology device" means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of children with disabilities.

(Authority: 20 U.S.C. § 1401(a)(25))

§ 300.6 Assistive technology service.

As used in this part, "assistive technology service" means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. The term includes—

(a) The evaluation of the needs of a child with a disability, including a functional evaluation of the child in the child's customary environment;

(b) Purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by children with disabilities;

(c) Selecting, designing, fitting, customizing, adapting, applying, retaining, repairing, or replacing assistive technology devices;

(d) Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;

(e) Training or technical assistance for a child with a disability or, if appropriate, that child's family; and

(f) Training or technical assistance for professionals (including individuals providing education or rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of children with disabilities.

(Authority: 20 U.S.C. § 1401(a)(26))

Note: The definitions of "assistive technology device" and "assistive technology service" used in this part are taken directly from section 602(a)(25)-(26) of the Act, but in accordance with Part B, the statutory reference to "individual with a disability" has been replaced with "child with a disability." The Act's definitions of "assistive technology device" and "assistive technology service" incorporate verbatim the definitions of these terms used in the Technology-Related Assistance for Individuals with Disabilities Act of 1988.

§ 300.7 Children with disabilities.

(a)(1) As used in this part, the term "children with disabilities" means those children evaluated in accordance with §§ 300.530-300.534 as having mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, specific learning disabilities, deaf-blindness, or multiple disabilities, and who because of those impairments need special education and related services.

(2) The term "children with disabilities" for children aged 3 through 5 may, at a State's discretion, include children

(i) Who are experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development, or adaptive development; and

(ii) Who, for that reason, need special education and related services.

(b) The terms used in this definition are defined as follows:

(1) "Autism" means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. The term does not apply if a child's educational performance is adversely affected primarily because the child has a serious emotional disturbance, as defined in paragraph (b)(9) of this section.

(2) "Deaf-blindness" means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational problems that they cannot be accommodated in special education programs solely for children with deafness or children with blindness.

(3) "Deafness" means a hearing impairment that is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, that adversely affects a child's educational performance.

(4) "Hearing impairment" means an impairment in hearing, whether permanent or fluctuating, that adversely affects a child's educational performance but that is not included under the definition of deafness in this section.

(5) "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period that adversely affects a child's educational performance.

(6) "Multiple disabilities" means concomitant impairments (such as mental retardation-blindness, mental retardation-orthopedic impairment, etc.), the combination of which causes such severe educational problems that they cannot be accommodated in special education programs solely for one of the impairments. The term does not include deaf-blindness.

(7) "Orthopedic impairment" means a severe orthopedic impairment that adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly (e.g., clubfoot, absence of some member, etc.), impairments caused by disease (e.g., poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures).

(8) "Other health impairment" means having limited strength, vitality, or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis,

rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes that adversely affects a child's educational performance.

(9) "Serious emotional disturbance" is defined as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance—

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors;

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(C) Inappropriate types of behavior or feelings under normal circumstances;

(D) A general pervasive mood of unhappiness or depression; or

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) The term includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have a serious emotional disturbance.

(10) "Specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. The term does not apply to children who have learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(11) "Speech or language impairment" means a communication disorder such as stuttering, impaired articulation, a language impairment, or a voice impairment that adversely affects a child's educational performance.

(12) "Traumatic brain injury" means an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. The term applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual and motor abilities; psychosocial behavior; physical functions; information processing; and speech. The term does not apply to brain injuries that are congenital or degenerative, or brain injuries induced by birth trauma.

(13) "Visual impairment including blindness" means an impairment in vision that, even with correction, adversely affects a child's educational performance. The term includes both partial sight and blindness.

(Authority: 20 U.S.C. § 1401(a)(1))

Note: If a child manifests characteristics of the disability category "autism" after age 3, that child still could be diagnosed as having "autism" if the criteria in paragraph (b)(1) of this section are satisfied.

§ 300.8 Free appropriate public education.

As used in this part, the term "free appropriate public education" means special education and related services that—

(a) Are provided at public expense, under public supervision and direction, and without charge;

(b) Meet the standards of the SEA, including the requirements of this part;

(c) Include preschool, elementary school, or secondary school education in the State involved; and

(d) Are provided in conformity with an IEP that meets the requirements of §§ 300.340-300.350.

(Authority: 20 U.S.C. § 1401(a)(18))

§ 300.9 Include.

As used in this part, the term "include" means that the items named are not all of the possible items that are covered, whether like or unlike the ones named.

(Authority: 20 U.S.C. § 1417(b))

§ 300.10 Intermediate educational unit.

As used in this part, the term "intermediate educational unit" means any public authority, other than an LEA, that—

(a) Is under the general supervision of an SEA;

(b) Is established by State law for the purpose of providing free public education on a regional basis; and

(c) Provides special education and related services to children with disabilities within that State.

(Authority: 20 U.S.C. § 1401 (a)(23))

§ 300.11 Local educational agency.

(a) [Reserved]

(b) For the purposes of this part, the term "local educational agency" also includes intermediate educational units.

(Authority: 20 U.S.C. § 1401 (a)(8))

§ 300.12 Native language.

As used in this part, the term "native language" has the meaning given that term by section 703(a)(2) of the Bilingual Education Act, which provides as follows:

The term "native language" when used with reference to an individual of limited English proficiency, means the language normally used by that individual, or in the case of a child, the language normally used by the parents of the child.

(Authority: 20 U.S.C. §§ 3283 (a)(2); 1401(a)(22))

Note: Section 602(a)(22) of the Act states that the term "native language" has the same meaning as the definition from section 703(a)(2) of the Bilingual Education Act. (The term is used in the prior notice and evaluation sections under § 300.505 (b)(2) and § 300.532(a)(1).) In using the term, the Act does not prevent the following means of communication:

(1) In all direct contact with a child (including evaluation of the child), communication would be in the language normally used by the child and not that of the parents, if there is a difference between the two.

(2) For individuals with deafness or blindness, or for individuals with no written language, the mode of communication would be that normally used by the individual (such as sign language, braille, or oral communication).

§ 300.13 Parent.

As used in this part, the term "parent" means a parent, a guardian, a person acting as a parent of a child, or a surrogate parent who has been appointed in accordance with § 300.514. The term does not include the State if the child is a ward of the State.

(Authority: 20 U.S.C. § 1415)

Note: The term "parent" is defined to include persons acting in the place of a parent, such as a grandmother or stepparent with whom a child lives, as well as persons who are legally responsible for a child's welfare.

§ 300.14 Public agency.

As used in this part, the term "public agency" includes the SEA, LEAs, IEUs, and any other political subdivisions of the State that are responsible for providing education to children with disabilities.

(Authority: 20 U.S.C. §§ 1412(2)(B); 1412(6); 1413(a))

§ 300.15 Qualified

As used in this part, the term "qualified" means that a person has met SEA approved or recognized certification, licensing, registration, or other comparable requirements that apply to the area in which he or she is providing special education or related services.

(Authority: 20 U.S.C. § 1417(b))

§ 300.16 Related Services

(a) As used in this part, the term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

(b) The terms used in this definition are defined as follows:

(1) "Audiology" includes—

(i) Identification of children with hearing loss;

(ii) Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing.

(iii) Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lip-reading), hearing evaluation, and speech conservation;

(iv) Creation and administration of programs for prevention of hearing loss;

(v) Counseling and guidance of pupils, parents, and teachers regarding hearing loss; and

(vi) Determination of the child's need for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

(2) "Counseling services" means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

(3) "Early identification and assessment of disabilities in children" means the implementation of a formal plan for identifying a disability as early as possible in a child's life.

(4) "Medical services" means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services.

(5) "Occupational therapy" includes—

(i) Improving, developing or restoring functions impaired or lost through illness, injury, or deprivation;

(ii) Improving ability to perform tasks for independent functioning when functions are impaired or lost; and

(iii) Preventing, through early intervention, initial or further impairment or loss of function.

(6) "Parent counseling and training" means assisting parents in understanding the special needs of their child and providing parents with information about child development.

(7) "Physical therapy" means services provided by a qualified physical therapist.

(8) "Psychological services" includes—

(i) Administering psychological and educational tests, and other assessment procedures;

(ii) Interpreting assessment results;

(iii) Obtaining, integrating, and interpreting information about child behavior and conditions related to learning.

(iv) Consulting with other staff members in planning school programs to meet the needs of children as indicated by psychological tests, interviews, and behavioral evaluations; and

(v) Planning and managing a program of psychological services, including psychological counseling for children and parents.

(9) "Recreation" includes—

(i) Assessment of leisure function;

(ii) Therapeutic recreation services;

(iii) Recreation programs in schools and community agencies; and

(iv) Leisure education.

(10) "Rehabilitation counseling services" means services provided by qualified personnel in individual or group sessions that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community of a student with a disability. The term also includes vocational rehabilitation services provided to students with disabilities by vocational rehabilitation programs funded under the Rehabilitation Act of 1973, as amended.

(11) "School health services" means services provided by a qualified school nurse or other qualified person.

(12) "Social work services in schools" includes—

(i) Preparing a social or developmental history on a child with a disability;

(ii) Group and individual counseling with the child and family;

(iii) Working with those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school; and

(iv) Mobilizing school and community resources to enable the child to learn as effectively as possible in his or her educational program.

(13) "Speech pathology" includes—

(i) Identification of children with speech or language impairments;

(ii) Diagnosis and appraisal of specific speech or language impairments;

(iii) Referral for medical or other professional attention necessary for the habilitation of speech or language impairments;

(iv) Provision of speech and language services for the habilitation or prevention of communicative impairments; and

(v) Counseling and guidance of parents, children, and teachers regarding speech and language impairments.

(14) "Transportation" includes—

(i) Travel to and from school and between schools;

(ii) Travel in and around school buildings; and

(iii) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability.

(Authority: 20 U.S.C. § 1401(a)(17))

Note: With respect to related services, the Senate Report states:

The Committee bill provides a definition of related services, making clear that all such related services may not be required for each individual child and that such term includes early identification and assessment of handicapping conditions and the provision of services to minimize the effects of such conditions.

(S. Rep. No. 94-166, p. 12 (1975))

The list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, and art, music, and dance therapy), if they are required to assist a child with a disability to benefit from special education.

There are certain kinds of services that might be provided by persons from varying professional backgrounds and with a variety of operational titles, depending upon requirements in individual States. For example, counseling services might be provided by social workers, psychologists, or guidance counselors, and psychological testing might be done by qualified psychological examiners, psychometrists, or psychologists, depending upon State standards.

Each related service defined under this part may include appropriate administration and supervisory activities that are necessary for program planning, management, and evaluation.

§ 300.17 Special education.

(a)(1) As used in this part, the term "special education" means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including—

(i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(ii) Instruction in physical education.

(2) The term includes speech pathology, or any other related service, if the service consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, and is considered special education rather than a related service under State standards.

(3) The term also includes vocational education if it consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability.

(b) The terms in this definition are defined as follows:

(1) "At no cost" means that all specially designed instruction is provided without charge, but does not preclude incidental fees that are normally charged to nondisabled students or their parents as a part of the regular education program.

(2) "Physical education" is defined as follows:

(i) The term means the development of—

(A) Physical and motor fitness;

(B) Fundamental motor skills and patterns; and

(C) Skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports).

(ii) The term includes special physical education, adaptive physical education, movement education, and motor development.

(Authority: 20 U.S.C. § 1401(a)(16))

(3) *Vocational education* means organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career requiring other than a baccalaureate or advanced degree.

(Authority: 20 U.S.C. § 1401(16))

Note 1: The definition of special education is a particularly important one under these regulations, since a child does not have a disability under this part unless he or she needs special education. (See the definition of children with disabilities in § 300.7.) The definition of related services (§ 300.16) also depends on this definition, since a related service must be necessary for a child to benefit from special education. Therefore, if a child does not need special education, there can be no related services, and the child is not a child with a disability and is therefore not covered under the Act.

Note 2: The above definition of vocational education is taken from the Vocational Education Act of 1963, as amended by Public Law 94-482. Under that Act, "vocational education" includes industrial arts and consumer and homemaking education programs.

§ 300.18 Transition services.

(a) As used in this part, "transition services" means a coordinated set of activities for a student, designed within an outcome-oriented process, that promotes movement from school to post-school activities, including postsecondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation.

(b) The coordinated set of activities described in paragraph (a) of this section must—

(1) Be based on the individual student's needs, taking into account the student's preferences and interests; and

(2) Include—

(i) Instruction;

(ii) Community experiences;

(iii) The development of employment and other post-school adult living objectives; and

(iv) If appropriate, acquisition of daily living skills and functional vocational evaluation.

(Authority: 20 U.S.C. § 1401(a)(19))

Note: Transition services for students with disabilities may be special education, if they are provided as specially designed instruction, or related services, if they are required to assist a student with a disability to benefit from special education. The list of activities in paragraph (b) is not intended to be exhaustive.

Subpart B—State Plans and Local Educational Agency Applications

State Plans—General

§ 300.110 Condition of assistance.

In order to receive funds under Part B of the Act for any fiscal year, a State must submit a State plan to the Secretary through its SEA, which plan shall be effective for a period of 3 fiscal years.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. §§ 1231g, 1412, 1413)

§ 300.111 Content of plan.

Each State plan must contain the provisions required in §§ 300.121-300.154.

(Authority: 20 U.S.C. §§ 1412, 1413)

State Plans—Contents

§ 300.121 Right to a free appropriate public education.

(a) Each State plan must include information that shows that the State has in effect a policy that ensures that all children with disabilities have the right to FAPE within the age ranges and timelines under § 300.122.

(b) The information must include a copy of each State statute, court order, State Attorney General opinion, and other State documents that show the source of the policy.

(c) The information must show that the policy—

(1) Applies to all public agencies in the State;

(2) Applies to all children with disabilities;

(3) Implements the priorities established under §§ 300.320-300.324; and

(4) Establishes timelines for implementing the policy in accordance with § 300.122.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. §§ 1412(1), (2)(B), (6); 1413(a)(1))

§ 300.122 Timelines and ages for free appropriate public education.

(a) *General.* Each State plan must include in detail the policies and procedures that the State will undertake or has undertaken in order to ensure that FAPE is available for all children with disabilities aged 3 through 18 within the State not later than September 1 1978, and for all children with disabilities aged 3 through 21 within the State not later than September 1, 1980.

(b) *Documents relating to timelines.* Each State plan must include a copy of each State statute, court order, Attorney General decision, and other State documents that demonstrate that the State has established timelines in accordance with paragraph (a) of this section.

(c) *Exception.* The requirement in paragraph (a) of this section does not apply to a State with respect to children with disabilities aged 3, 4, 5, 18, 19, 20, or 21 to the extent that the requirement would be inconsistent with State law or practice, or the order of any court, respecting public education for one or more of those age groups in the State.

(d) *Documents relating to exceptions.* Each State plan must—

(1) Describe in detail the extent that the exception in paragraph (c) of this section applies to the State; and

(2) Include a copy of each State law, court order, and other documents that provide a basis for the exception.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1412(2)(B))

§ 300.123 Full educational opportunity goal.

Each State plan must include in detail the policies and procedures that the State will undertake, or has undertaken, in order to ensure that the State has a goal of providing full educational opportunity to all children with disabilities aged birth through 21.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1412(2)(A))

§ 300.124 [Reserved]

§ 300.125 Full educational opportunity goal timetable.

Each State plan must contain a detailed timetable for accomplishing the goal of providing full educational opportunity for all children with disabilities.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1412(2)(A))

§ 300.126 Full educational opportunity goal— facilities, personnel, and services.

Each State plan must include a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet the goal of providing full educational opportunity for all children with disabilities.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1412(2)(A))

§ 300.127 Priorities.

Each State plan must include information that shows that—

(a) The State has established priorities that meet the requirements of §§ 300.320-300.324;

(b) The State priorities meet the timelines under § 300.122; and

(c) The State has made progress in meeting those timelines.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1412(3))

§ 300.128 Identification, location, and evaluation of children with disabilities.

(a) *General requirement.* Each State plan must include in detail the policies and procedures that the State will undertake, or has undertaken, to ensure that—

(1) All children with disabilities, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated; and

(2) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

(b) *Information.* Each State plan must:

(1) Designate the State agency (if other than the SEA) responsible for coordinating the planning and implementation of the policies and procedures under paragraph (a) of this section.

(2) Name each agency that participates in the planning and implementation and describe the nature and extent of its participation.

(3) Describe the extent that—

(i) The activities described in paragraph (a) of this section have been achieved under the current State plan; and

(ii) The resources named for these activities in that plan have been used.

(4) Describe each type of activity to be carried out during the next school year, including the role of the agency named under paragraph (b)(1) of this section, timelines for completing those activities, resources that will be used, and expected outcomes.

(5) Describe how the policies and procedures under paragraph (a) of this section will be monitored to ensure that the SEA obtains—

(i) The number of children with disabilities within each disability category that have been identified, located, and evaluated; and

(ii) Information adequate to evaluate the effectiveness of those policies and procedures.

(6) Describe the method the State uses to determine which children are currently receiving special education and related services and which children are not receiving special education and related services.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C § 1412(2)(C))

Note 1: The State is responsible for ensuring that all children with disabilities are identified, located, and evaluated, including children in all public and private agencies and institutions in the State. Collection and use of data are subject to the confidentiality requirements of §§ 300.560-300.576.

Note 2: Under both Parts B and H of the Act, States are responsible for identifying, locating, and evaluating infants and toddlers from birth through 2 years of age who have disabilities or who are suspected of having disabilities. In States where the SEA and the State's lead agency for the Part H program are different and the Part H lead agency will be participating in the child find activities described in paragraph (a) of this section, the nature and extent of the Part H lead agency's participation must, under paragraph (b)(2) of this section, be included in the State plan. With the SEA's agreement, the Part H lead agency's participation may include the actual implementation of child find activities for infants and toddlers. The use of an interagency agreement or other mechanism for providing for the Part H lead agency's participation would not alter or diminish the responsibility of the SEA to ensure compliance with all child find requirements, including the requirement in paragraph (a)(1) of this section that all children with disabilities who are in need of special education and related services are evaluated.

§ 300.129 Confidentiality of personally identifiable information.

(a) Each State plan must include in detail the policies and procedures that the State will undertake, or has undertaken, in order to ensure the protection of the confidentiality of any personally identifiable information collected, used, or maintained under this part.

(b) The Secretary shall use the criteria in §§ 300.560-300.576 to evaluate the policies and procedures of the State under paragraph (a) of this section.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. §§ 1412(2)(D); 1417(c))

Note: The confidentiality regulations were published in the **Federal Register** in final form on February 27, 1976 (41 FR 8603-8610), and met the requirements of Part B of the Act. Those regulations are incorporated in §§ 300.560-300.576.

§ 300.130 Individualized education programs.

(a) Each State plan must include information that shows that each public agency in the State maintains records of the IEP of each child with disabilities, and each public agency establishes, reviews, and revises each program as provided in §§ 300.340-300.350.

(b) Each State plan must include—

(1) A copy of each State statute, policy, and standard that regulates the manner in which IEPs are developed, implemented, reviewed, and revised; and

(2) The procedures that the SEA follows in monitoring and evaluating those programs.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. §§ 1412(4), 1413(a)(1))

§ 300.131 Procedural safeguards.

Each State plan must include procedural safeguards that ensure that the requirements of §§ 300.500-300.514 are met.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1412(5)(A))

§ 300.132 Least restrictive environment.

(a) Each State plan must include procedures that ensure that the requirements of §§ 300.550-300.556 are met.

(b) Each State plan must include the following information:

(1) The number of children with disabilities in the State, within each disability category, who are participating in regular education programs, consistent with §§ 300.550-300.556.

(2) The number of children with disabilities who are in separate classes or separate school facilities, or who are otherwise removed from the regular education environment.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1412(5)(B))

§ 300.133 Protection in evaluation procedures.

Each State plan must include procedures that ensure that the requirements of §§ 300.530-300.534 are met.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1412(5)(C))

§ 300.134 Responsibility of State educational agency for all educational programs.

(a) Each State plan must include information that shows that the requirements of § 300.600 are met.

(b) The information under paragraph (a) of this section must include a copy of each State statute, State regulation, signed agreement between respective agency officials, and any other documents that show compliance with that paragraph.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1412(6))

§ 300.135 [Reserved]

§ 300.136 Implementation procedures—State educational agency.

Each State plan must describe the procedures the SEA follows to inform each public agency of its responsibility for ensuring effective implementation of procedural safeguards for the children with disabilities served by that public agency.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1412(6))

§ 300.137 Procedures for consultation.

Each State plan must include an assurance that in carrying out the requirements of section 612 of the Act, procedures are established for consultation with individuals involved in or concerned with the education of children with disabilities, including individuals with disabilities and parents of children with disabilities.

(Authority: 20 U.S.C. § 1412(7)(A))

§ 300.138 Other Federal programs.

Each State plan must provide that programs and procedures are established to ensure that funds received by the State or any public agency in the State under any other Federal program, including subpart 2 of part D of chapter 1 of title I of the Elementary and Secondary Education Act of 1965, under which there is specific authority for assistance for the education of children with disabilities, are used by the State, or any public agency in the State, only in a manner consistent with the goal of providing FAPE for all children with disabilities, except that nothing in this section limits the specific requirements of the laws governing those Federal programs.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1413(a)(2))

§ 300.139 Comprehensive system of personnel development.

Each State plan must include the procedures required under §§ 300.380-300.383.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1413(a)(3))

§ 300.140 Private schools.

Each State plan must include policies and procedures that ensure that the requirements of §§ 300.400-300.403 and §§ 300.450-300.452 are met.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1413(a)(4))

§ 300.141 Recovery of funds for misclassified children.

Each State plan must include policies and procedures that ensure that the State seeks to recover any funds provided under Part B of the Act for services to a child who is determined to be erroneously classified as eligible to be counted under section 611(a) or (d) of the Act.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1413(a)(5))

§§ 300.142-300.143 [Reserved]

§ 300.144 Hearing on application.

Each State plan must include procedures to ensure that the SEA does not take any final action with respect to an application submitted by an LEA before giving the LEA reasonable notice and an opportunity for a hearing under § 76.401(d) of this title.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1413(a)(8))

§ 300.145 Prohibition of commingling.

Each State plan must provide assurance satisfactory to the Secretary that funds provided under part B of the Act are not commingled with State funds.

(Authority: 20 U.S.C. § 1413(a)(9))

Note: This assurance is satisfied by the use of a separate accounting system that includes an audit trail of the expenditure of the part B funds. Separ-ate bank accounts are not required. (See 34 CFR 76.702 (Fiscal control and fund accounting procedures).)

§ 300.146 Annual evaluation.

Each State plan must include procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of children with disabilities, including evaluation of IEPs.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1413(a)(11))

§ 300.147 State advisory panel.

Each State plan must provide that the requirements of §§ 300.650-300.653 are met.

(Authority: 20 U.S.C. § 1413(a)(12))

§ 300.148 Policies and procedures for use of Part B funds.

Each State plan must set forth policies and procedures designed to ensure that funds paid to the State under Part B of the Act are spent in accordance with the provisions of Part B, with particular attention given to sections 611(b), 611(c), 611(d), 612(2) and 612(3) of the Act.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1413(a)(1))

§ 300.149 Description of use of Part B funds.

(a) State allocation. Each State plan must include the following information about the State's use of funds under § 300.370 and § 300.620:

(1) A list of administrative positions, and a description of duties for each person

whose salary is paid in whole or in part with those funds.

(2) For each position, the percentage of salary paid with those funds.

(3) A description of each administrative activity the SEA will carry out during the next school year with those funds.

(4) A description of each direct service and each support service that the SEA will provide during the next period covered by the State plan with those funds, and the activities the State advisory panel will undertake during that period with those funds.

(b) Local educational agency allocation. Each State plan must include—

(1) As estimate of the number and percent of LEAs in the State that will receive an allocation under this part (other than LEAs that submit a consolidated application);

(2) An estimate of the number of LEAs that will receive an allocation under a consolidated application;

(3) An estimate of the number of consolidated applications and the average number of LEAs per application; and

(4) A description of direct services that the SEA will provide under § 300.360.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1412(6))

§ 300.150 State-level nonsupplanting.

Each State plan must provide assurance satisfactory to the Secretary that funds provided under this part will be used so as to supplement and increase the level of Federal (other than funds available under this part), State, and local funds—including funds that are not under the direct control of the SEA or LEAs—expended for special education and related services provided to children with disabilities under this part and in no case to supplant those Federal (other that funds available under this part), State, and local funds unless a waiver is granted in accordance with § 300.589.

(Authority: 20 U.S.C. § 1413(a)(9))

Note: This requirement is distinct from the LEA nonsupplanting provision already contained in these regulations at § 300.230. Under this State-level provision, the State must assure that Part B funds distributed to LEAs and IEUs will be used to supplement and not supplant other Federal, State, and local funds (including funds not under the control of educational agencies) that would have been expended for special education and related services provided to children with disabilities in the absence of the Part B funds. The portion of Part B funds that are not distributed to LEAs or IEUs under the statutory formula (20 U.S.C. § 1411(d)) are not subject to this nonsupplanting provision. See 20 U.S.C. § 1411(c)(3). States may not permit LEAs or IEUs to use Part B funds to satisfy a financial commitment for services that would have been paid for by a health or other agency pursuant to policy or practice but for the fact that these services are now included in the IEPs of children with disabilities.

(H.R. Rep. No. 860, 99th Cong., 21-22 (1986))

§ 300.151 Additional information if the State educational agency provides direct services.

If an SEA provides FAPE for children with disabilities or provides them with direct services, its State plan must include the information required under §§ 300.226, 300.227, 300.231, and 300.235.

(Authority: 20 U.S.C. § 1413(b))

§ 300.152 Interagency agreements.

(a) Each State plan must set forth policies and procedures for developing and implementing interagency agreements between—

(1) The SEA; and

(2) All other State and local agencies that provide or pay for services required under this part for children with disabilities.

(b) The policies and procedures referred to in paragraph (a) of this section must—

(1) Describe the role that each of those agencies plays in providing or paying for services required under this part for children with disabilities; and

(2) Provide for the development and implementation of interagency agreements that—

(i) Define the financial responsibility of each agency for providing children with disabilities with FAPE;

(ii) Establish procedures for resolving interagency disputes among agencies that are parties to the agreements; and

(iii) Establish procedures under which LEAs may initiate proceedings in order to secure reimbursement from agencies that are parties to the agreements or otherwise implement the provisions of the agreements.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1413(a)(13))

§ 300.153 Personnel standards.

(a) As used in this part:

(1) "Appropriate professional requirements in the State" means entry level requirements that—

(i) Are based on the highest requirements in the State applicable to the profession or discipline in which a person is providing special education or related services; and

(ii) Establish suitable qualifications for personnel providing special education and related services under this part to children and youth with disabilities who are served by State, local, and private agencies (see § 300.2).

(2) "Highest requirements in the State applicable to a specific profession or discipline" means the highest entry-level academic degree needed for any State approved or recognized certification, licensing, registration, or other comparable requirements that apply to that profession or discipline.

(3) "Profession or discipline" means a specific occupational category that—

(i) Provides special education and related services to children with disabilities under this part;

(ii) Has been established or designated by the State; and

(iii) Has a required scope of responsibility and degree of supervision.

(4) "State approved or recognized certification, licensing, registration, or other comparable requirements" means the requirements that a State legislature either has enacted or has authorized a State agency to promulgate through rules to establish the entry-level standards for employment in a specific profession or discipline in that State.

(b)(1) Each State plan must include policies and procedures relating to the establishment and maintenance of standards to ensure that personnel necessary to carry out the purposes of this part are appropriately and adequately prepared and trained.

(2) The policies and procedures required in paragraph (b)(1) of this section must provide for the establishment and maintenance of standards that are consistent with any State approved or recognized certification, licensing, registration, or other comparable requirements that apply to the profession or discipline in which a person is providing special education or related services.

(c) To the extent that a State's standards for a profession or discipline, including standards for temporary or emergency certification, are not based on the highest requirements in the State applicable to a specific profession or discipline, the State plan must include the steps the State is taking and the procedures for notifying public agencies and personnel of those steps and the timelines it has established for the retraining or hiring of personnel to meet appropriate professional requirements in the State.

(d)(1) In meeting the requirements in paragraphs (b) and (c) of this section, a determination must be made about the status of personnel standards in the State. That determination must be based on current information that accurately describes, for each profession or discipline in which personnel are providing special education or related services, whether the applicable standards are consistent with the highest requirements in the State for that profession or discipline.

(2) The information required in paragraph (d)(1) of this section must be on file in the SEA, and available to the public.

(e) In identifying the highest requirements in the State for purposes of this section, the requirements of all State statutes and the rules of all State agencies applicable to serving children and youth with disabilities must be considered.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1413(a)(14))

Note: The regulations require that the State use its own existing highest requirements to determine the standards appropriate to personnel who provide special education and related services under this part. The regulations do not require States to set any specified training standard, such as a master's degree, for employment of personnel who provide services under this part. In some instances, States will be required to show that they are taking steps to retrain or to hire personnel to meet the standards adopted by the SEA that are based on requirements for practice in a specific profession or discipline that were established by other State agencies. States in this position need not, however, require personnel providing services under this part to apply for and obtain the license, registration, or other comparable credential required by other agencies of individuals in that profession or discipline. The regulations permit each State to determine the specific occupational categories required to provide special education and related services and to revise or expand these categories as needed. The professions or disciplines defined by the State need not be limited to traditional occupational categories.

§ 300.154 Transition of individuals from Part H to Part B.

Each State plan must set forth policies and procedures relating to the smooth transition for those individuals participating in the early intervention program under Part H of the Act who will participate in preschool programs assisted under this part, including a method of ensuring that when a child turns age 3 an IEP, or, if consistent with sections 614(a)(5) and 677(d) of the Act, an individualized family service plan, has been developed and implemented by the child's third birthday.

(Authority: 20 U.S.C. § 1413(a)(15))

Local Educational Agency Applications—General

§ 300.180 Submission of application.

In order to receive payments under Part B of the Act for any fiscal year, an LEA must submit an application to the SEA.

Approved by the Office of Management and Budget under control number 1820-0600.

(Authority: 20 U.S.C. § 1414 (a))

§ 300.181 [Reserved]

§ 300.182 The excess cost requirement.

An LEA may only use funds under part B of the Act for the excess costs of providing special education and related services for children with disabilities.

(Authority: 20 U.S.C. § 1414(a)(1), (a)(2)(B)(i))

§ 300.183 Meeting the excess cost requirements.

(a) An LEA meets the excess cost requirement if it has on the average spent at least the amount determined under § 300.184 for the education of each of its children with disabilities. This amount may not include capital outlay or debt service.

(Authority: 20 U.S.C. §§ 1402(20); 1414(a)(1))

Note: The excess cost requirement means that the LEA must spend a certain minimum amount for the education of its children with disabilities before part B funds are used. This ensures that children served with part B funds have at least the same average amount spent of them, from sources other than part B, as do the children in the school district taken as a whole.

The minimum amount that must be spent for the education of children with disabilities is computed under a statutory formula. Section 300.184 implements this formula and gives a step-by-step method to determine the minimum amount. Excess costs are those costs of special education and related services that exceed the minimum amount. Therefore, if an LEA can show that it has (on the average) spent the minimum amount for the education of each of its children with disabilities, it has met the excess cost requirement, and all additional costs are excess costs. Part B funds can then be used to pay for these additional costs, subject to the other requirements of part B (priorities, etc.). In the Note under § 300.184 there is an example of how the minimum amount is computed.

§ 300.184 Excess costs—computation of minimum amount.

The minimum-average amount that an LEA must spend under § 300.183 for the education of each of its children with disabilities is computed as follows:

(a) Add all expenditures of the LEA in the preceding school year, except capital outlay and debt service—

(1) For elementary school students, if the child with a disability is an elementary school student; or

(2) For secondary school students, if the child with a disability is a secondary school student.

(b) From this amount, subtract the total of the following amounts spent for elementary school students or for secondary school students, as the case may be—

(1) Amounts the agency spent in the preceding school year from funds awarded under part B of the Act and titles I and VII of the Elementary and Secondary Education Act of 1965; and

(2) Amounts from State and local funds that the agency spent in the preceding school year for—

(i) Programs for children with disabilities;

(ii) Programs to meet the special educational needs of educationally deprived children; and

(iii) Programs of bilingual education for limited English proficient children.

(c) Divide the result under paragraph (b) of this section by the average number of students enrolled in the agency in the preceding school year—

(1) In its elementary school, if the child with a disability is an elementary school student; or

(2) In its secondary schools, if the child with a disability is a secondary school student.

(Authority: 20 U.S.C. § 1414(a)(1))

Note: The following is an example of how an LEA might compute the average minimum amount it must spend for the education of each of its children with disabilities, under § 300.183. This example follows the formula in § 300.184. Under the statute and regulations, the LEA must make one computation for children with disabilities in its elementary schools and a separate computation for children with disabilities in its secondary schools. The computation for elementary school students with disabilities would be done as follows:

a. First, the LEA must determine its total amount of expenditures for elementary school students from all sources—local, State, and Federal (including part B)—in the preceding school year. Only capital outlay and debt service are excluded.

Example: An LEA spent the following amounts last year for elementary school students (including its elementary school students with disabilities):

(1) From local tax funds	$2,750,000
(2) From State funds	7,000,000
(3) From Federal funds	750,000
	10,500,000

Of this total, $500,000 was for capital outlay and debt service relating to the education of elementary school students. This must be subtracted from total expenditures:

$10,500,000
-500,000

Total expenditures for elementary school students (less capital outlay and debt service)	10,000,000

b. Next, the LEA must subtract amounts spent for:

(1) Programs for children with disabilities;

(2) Programs to meet the special educational needs of educationally deprived children; and

(3) Programs of bilingual education for limited English proficient children.

These are funds that the LEA actually spent, not funds received last year but carried over for the current school year.

Example: The LEA spent the following amounts for elementary school students last year:

(1) From funds under Chapter 1 of title I of the Elementary and Secondary Education Act of 1965	300,000
(2) From a special State program for educationally deprived children	200,000
(3) From a grant under Part B	200,000
(4) From State funds for the education of children with disabilities	500,000
(5) From a locally-funded program for children with disabilities	250,000
(6) From a grant for a bilingual education program under Title VII of the Elementary and Secondary Education Act of 1965	150,000
Total	1,600,000

(An LEA would also include any other funds it spent from Federal, State, or local sources for the three basic purposes: Children with disabilities, educationally deprived children, and bilingual education for limited English proficient children.)

This amount is subtracted from the LEA's total expenditure for elementary school students computed above:

$10,000,000
1,600,000
8,400,000

c. The LEA next must divide by the average number of students enrolled in the elementary schools of the agency last year (including its students with disabilities).

Example: Last year, an average of 7,000 students were enrolled in the agency's elementary schools. This must be divided into the amount computed under the above paragraph: $8,400,000/7,000 students = $1,200/student.

This figure is in the minimum amount the LEA must spend (on the average) for the education of each of its students with disabilities. Funds under Part B may be used only for costs over and above this minimum. In this example, if the LEA has 100 elementary school students with disabilities, it must keep records adequate to show that it has spent at least $120,000 for the education of those students (100 students times $1,200/student), not including capital outlay and debt service.

This $120,000 may come from any funds except funds under Part B, subject to any legal requirements that govern the use of those other funds.

If the LEA has secondary school students with disabilities, it must do the same computation for them. However the amounts used in the computation would be those the LEA spent last year for the education of secondary school students, rather than for elementary school students.

§ 300.185 Computation of excess costs—consolidated application.

The minimum average amount under § 300.183, if two or more LEAs submit a consolidated application, is the average of the combined minimum average amounts determined under § 300.184 in those agencies for elementary or secondary school students, as the case may be.

(Authority: 20 U.S.C. § 1414(a)(1))

§ 300.186 Excess costs—limitation on use of Part B funds.

(a) The excess cost requirement prevents an LEA from using funds provided under Part B of the Act to pay for all of the costs directly attributable to the education of a child with a disability, subject to paragraph (b) of this section.

(b) The excess cost requirement does not prevent an LEA from using Part B funds to pay for all of the costs directly attributable to the education of a child with a disability in any of the age ranges three, four, five eighteen, nineteen, twenty, or twenty-one, if no local or State funds are available for nondisabled children in that age range. However, the LEA must comply with the nonsupplanting and other requirements of this part in providing the education and services.

(Authority: 20 U.S.C. §§ 1402(20); 1414(a)(1))

§§ 300.187-300.189 [Reserved]

§ 300.190 Consolidated applications.

(a) [Reserved]

(b) *Required applications.* An SEA may require LEAs to submit a consolidated application for payments under Part B of the Act if the SEA determines that an individual application submitted by an LEA will be disapproved because—

(1) The agency's entitlement is less than the $7,500 minimum required by section 611(c)(4)(A)(i) of the Act (§ 300.360(a)(1)); or

(2) The agency is unable to establish and maintain programs of sufficient size and scope to effectively meet the educational needs of children with disabilities.

(c) *Size and scope of program.* The SEA shall establish standards and procedures for determinations under paragraph (b)(2) of this section.

(Authority: 20 U.S.C. § 1414(c)(1))

§ 300.191 [Reserved]

§ 300.192 State regulation of consolidated applications.

(a) The SEA shall issue regulations with respect to consolidated applications submitted under this part.

(b) The SEA's regulations must—

(1) Be consistent with sections 612(1)-(7) and 613(a) of the Act; and

(2) Provide participating LEAs with joint responsibilities for implementing programs receiving payments under this part.

Approved by the Office of Management and Budget under control number 1820-0600.

(Authority: 20 U.S.C. § 1414(c)(2)(B))

(c) If an IEU is required by State law to carry out this part, the joint responsibilities given to LEAs under paragraph (b)(2) of this section do not apply to the administration and disbursement of any payments received by the IEU. Those administrative responsibilities must be carried out exclusively by the IEU.

(Authority: 20 U.S.C. § 1414(c)(2)(C))

§ 300.193 State educational agency approval; disapproval.

(a)-(b) [Reserved]

(c) In carrying out its functions under this section, each SEA shall consider any decision resulting from a hearing under §§ 300.506-300.513 that is adverse to the LEA involved in the decision.

(Authority: 20 U.S.C. § 1414(b)(3))

§ 300.194 Withholding.

(a) If an SEA, after giving reasonable notice and an opportunity for a hearing to an LEA, decides that the LEA in the administration of an application approved by the SEA has failed to comply with any requirement in the application, the SEA, after giving notice to the LEA, shall—

(1) Make no further payments to the LEA until the SEA is satisfied that there is no longer any failure to comply with the requirement; or

(2) Consider its decision in its review of any application made by the LEA under § 300.180; or

(3) Both.

(b) [Reserved]

(Authority: 20 U.S.C. § 1414(b)(2))

Local Educational Agency Applications—Contents

§ 300.220 Child Identification.

Each application must include procedures that ensure that all children residing within the jurisdiction of the LEA who have disabilities, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated, including a practical method for determining which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

Approved by the Office of Management and Budget under control number 1820-0600.

(Authority: 20 U.S.C. § 1414(a)(1)(A))

Note: The LEA is responsible for ensuring that all children with disabilities within its jurisdiction are identified, located, and evaluated, including children in all public and private agencies and institutions within that jurisdiction. Collection and use of data are subject to the confidentiality requirements of §§ 300.560-300.576.

§ 300.221 Confidentiality of personally identifiable information.

Each application must include policies and procedures that ensure that the criteria in §§ 300.560-300.574 are met.

(Authority: 20 U.S.C. § 1414(a)(1)(B))

§ 300.222 Full educational opportunity goal timetable.

Each application must—(a) Include a goal of providing full educational opportunity to all children with disabilities, aged birth through 21; and

(b) Include a detailed timetable for accomplishing the goal.

Approved by the Office of Management and Budget under control number 1820-0600.

(Authority: 20 U.S.C. § 1414(a)(1)(C),(D))

§ 300.223 Facilities, personnel, and services.

Each application must provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal in § 300.222.

Approved by the Office of Management and Budget under control number 1820-0600.

(Authority: 20 U.S.C. § 1414(a)(1)(E))

§ 300.224 Personnel development.

Each application must include procedures for the implementation and use of the comprehensive system of personnel development established by the SEA under § 300.139.

Approved by the Office of Management and Budget under control number 1820-0600.

(Authority: 20 U.S.C. § 1414(a)(1)(C)(i))

§ 300.225 Priorities.

Each application must include priorities that meet the requirements of §§ 300.320-300.324.

Approved by the Office of Management and Budget under control number 1820-0600.

(Authority: 20 U.S.C. § 1414(a)(1)(C)(ii))

§ 300.226 Parent involvement.

Each application must include procedures to ensure that, in meeting the goal under § 300.222, the LEA makes provision for participation of and consultation with parents or guardians of children with disabilities.

Approved by the Office of Management and Budget under control number 1820-0600.

(Authority: 20 U.S.C. § 1414(a)(1)(C)(iii))

§ 300.227 Participation in regular education programs.

(a) Each application must include procedures to ensure that to the maximum extent practicable, and consistent with §§ 300.550-300.553, the LEA provides special services to enable children with disabilities to participate in regular educational programs.

(b) Each application must describe—(1) The types of alternative placements that are available for children with disabilities; and

(2) The number of children with disabilities within each disability category who are served in each type of placement.

Approved by the Office of Management and Budget under control number 1820-0600.

(Authority: 20 U.S.C. § 1414(a)(1)(C)(iv))

§ 300.228 [Reserved]

§ 300.229 Excess cost.

Each application must provide assurance satisfactory to the SEA that the LEA uses funds provided under part B of the Act only for costs that exceed the amount computed under § 300.184 and that are directly attributable to the education of children with disabilities.

(Authority: 20 U.S.C. § 1414(a)(2)(B))

§ 300.230 Nonsupplanting.

(a) Each application must provide assurance satisfactory to the SEA that the

LEA uses funds provided under part B of the Act to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of children with disabilities, and in no case to supplant those State and local funds.

(b) To meet the requirement in paragraph (a) of this section, the total amount or average per capita amount of State and local school funds budgeted by the LEA for expenditures in the current fiscal year for the education of children with disabilities must be at least equal to the total amount or average per capita amount of State and local school funds actually expended for the education of children with disabilities in the most recent preceding fiscal year for which the information is available. Allowance may be made for—

(1) Decreases in enrollment of children with disabilities; and

(2) Unusually large amounts of funds expended for such long-term purposes as the acquisition of equipment and the construction of school facilities.

(Authority: 20 U.S.C. § 1414(a)(2)(B))

§ 300.231 Comparable services.

(a) Each application must provide assurance satisfactory to the SEA that the LEA meets the requirements of this section.

(b) An LEA may not use funds under part B of the Act to provide services to children with disabilities unless the LEA uses State and local funds to provide services to those children that, taken as a whole, are at least comparable to services provided to other children with disabilities in that LEA.

(c) Each LEA shall maintain records that show that the LEA meets the requirement in paragraph (b) of this section.

Approved by the Office of Management and Budget under control number 1820-0600.

(Authority: 20 U.S.C. § 1414(a)(2)(C))

Note: Under the "comparability" requirement, if State and local funds are used to provide certain services, those services must be provided with State and local funds to all children with disabilities in the LEA who need them. Part B funds may then be used to supplement existing services, or to provide additional services to meet special needs. This, of course, is subject to the other requirements of the Act, including the priorities under §§ 300.320-300.324.

§§ 300.232-300.234 [Reserved]

§ 300.235 Individualized education programs.

Each application must include procedures to assure that the LEA complies with §§ 300.340-300.350.

Approved by the Office of Management and Budget under control number 1820-0600.

(Authority: 20 U.S.C. § 1414(a)(5))

§ 300.236 [Reserved]

§ 300.237 Procedural safeguards.

Each application must provide assurance satisfactory to the SEA that the LEA has procedural safeguards that meet the requirements of §§ 300.500-300.515.

(Authority: 20 U.S.C. § 1414(a)(7))

§ 300.238 Use of Part B funds.

Each application must describe how the LEA will use the funds under part B of the Act during the next school year.

Approved by the Office of Management and Budget under control number 1820-0600.

(Authority: 20 U.S.C. § 1414(a))

§ 300.239 [Reserved]

§ 300.240 Other requirements.

Each local application must include additional procedures and information that the SEA may require in order to meet the State plan requirements of §§ 300.121-300.153.

Approved by the Office of Management and Budget under control number 1820-0600.

(Authority: 20 U.S.C. § 1414(a)(6))

Application From Secretary of the Interior

§ 300.260 Submission of application; approval.

(a) In order to receive a grant under this part, the Secretary of the Interior shall submit an application that—

(1) Meets the requirements of section 612(1), 612(2)(C)-(E), 612(4), 612(5), 612(6), and 612(7) of the Act (including monitoring and evaluation activities);

(2) Meets the requirements of section 613(a), (2), (3), (4)(B), (5), (6), (7), (10), (11), (12), (13), (14), and (15), 613(b), and 613(e) of the Act;

(3) Meets the requirements of section 614(a)(1)(A)-(B), (2)(A), (C), (3), (4), (5), and (7) of the Act;

(4) Meets the requirements of this part

that implement the sections of the Act listed in paragraphs (a)(1)-(3) of this section.

(5) Includes a description of how the Secretary of the Interior will coordinate the provision of services under this part with LEAs, tribes and tribal organizations, and other private and Federal service providers;

(6) Includes an assurance that there are public hearings, adequate notice of such hearings, and an opportunity for comment afforded to members of tribes, tribal governing bodies, and affected local school boards before the adoption of the policies, programs, and procedures required under paragraphs (a)(1)-(3) of this section;

(7) Includes an assurance that the Secretary of the Interior will provide such information as the Secretary may require to comply with section 618(b)(1) of the Act, including data on the number of children and youth with disabilities served and the types and amounts of services provided and needed;

(8) Includes an assurance that, by October 1, 1992, the Secretaries of the Interior and Health and Human Services will enter into a memorandum of agreement, to be provided to the Secretary, for the coordination of services, resources, and personnel between their respective Federal, State, and local offices and with SEAs and LEAs and other entities to facilitate the provision of services to Indian children with disabilities residing on or near reservations. That agreement must provide for the apportionment of responsibilities and costs, including but not limited to, those related to child find, evaluation, diagnosis, remediation or therapeutic measures, and (where appropriate) equipment and medical or personal supplies, or both, as needed for a child to remain in school or a program; and

(9) Includes an assurance that the Department of the Interior will cooperate with the Department of Education in the latter's exercise of monitoring and oversight of this application, and any agreements entered into between the Secretary of the Interior and other entities under the Act and will fulfill its duties under the Act.

(b) Sections 300.581-300.585 apply to grants available to the Secretary of the Interior under this part.

(Authority: 20 U.S.C. § 1411(f))

§ 300.261 Public participation.

In the development of the application for the Department of the Interior, the Secretary of the Interior shall provide for public participation consistent with §§ 300.280-300.284.

(Authority: 20 U.S.C. § 1411(f))

§ 300.262 Use of Part B funds.

(a)(1) The Department of the Interior may use five percent of its payment under § 300.709 in any fiscal year, or $350,000, whichever is greater, for administrative costs in carrying out the provisions of this part.

(2) The remainder of the payments to the Secretary of the Interior under § 300.709 in any fiscal year must be used in accordance with the priorities under §§ 300.320-300.324.

(b) Payments to the Secretary of the Interior under § 300.710 must be used in accordance with that section.

(Authority: 20 U.S.C. § 1411(f))

§ 300.263 Applicable regulations.

The Secretary of the Interior shall comply with requirements of §§ 300.301-300.303, §§ 300.305-300.307, and §§ 300.340-300.347, § 300.350, §§300.360-300.383, §§ 300.400-300.402, §§ 300.500-300.585, §§ 300.600-300.621, and §§ 300.660-300.662.

(Authority: 20 U.S.C. § 1411(f)(2))

Public Participation

§ 300.280 Public hearings before adopting a State plan.

Prior to its adoption of a State plan, the SEA shall—

(a) Make the plan available to the general public;

(b) Hold public hearings; and

(c) Provide an opportunity for comment by the general public on the plan.

Approved by the Office of Management and Budget under control number 1820-0600.

(Authority: 20 U.S.C. § 1412(7))

§ 300.281 Notice.

(a) The SEA shall provide notice to the general public of the public hearings.

(b) The notice must be in sufficient detail to inform the general public about—

(1) The purpose and scope of the State plan and its relation to part B of the Act;

(2) The availability of the State plan;

(3) The date, time, and location of each public hearing;

(4) The procedures for submitting written comments about the plan; and

(5) The timetable for developing the final plan and submitting it to the Secretary for approval.

(c) The notice must be published or announced—

(1) In newspapers or other media, or

both, with circulation adequate to notify the general public about the hearings; and

(2) Enough in advance of the date of the hearings to afford interested parties throughout the State a reasonable opportunity to participate.

Approved by the Office of Management and Budget under control number 1820-0600.

(Authority: 20 U.S.C. § 1412(7))

§ 300.282 Opportunity to participate; comment period.

(a) The SEA shall conduct the public hearings at times and places that afford interested parties throughout the State a reasonable opportunity to participate.

(b) The plan must be available for comment for a period of at least 30 days following the date of the notice under § 300.281.

(Authority: 20 U.S.C. § 1412(7))

§ 300.283 Review of public comments before adopting plan.

Before adopting its State plan, the SEA shall—

(a) Review and consider all public comments; and

(b) Make any necessary modifications in the plan.

(Authority: 20 U.S.C. § 1412(7))

§ 300.284 Publication and availability of approved plan.

After the Secretary approves a State plan, the SEA shall give notice in newspapers or other media, or both, that the plan is approved. The notice must name places throughout the State where the plan is available for access by any interested person.

Approved by the Office of Management and Budget under control number 1820-0600.

(Authority: 20 U.S.C. § 1412(7))

Subpart C—Services

Free Appropriate Public Education

§ 300.300 Timelines for free appropriate public education.

(a) *General.* Each State shall ensure that FAPE is available to all children with disabilities aged 3 through 18 within the State not later than September 1, 1978, and to all children with disabilities aged 3 through 21 within the State not later than September 1, 1980.

(b) *Age ranges 3-5 and 18-21.* This paragraph provides rules for applying the requirement in paragraph (a) of this section to children with disabilities aged 3, 4, 5, 18, 19, 20, and 21:

(1) If State law or a court order requires the State to provide education for children with disabilities in any disability category in any of these age groups, the State must make FAPE available to all children with disabilities of the same age who have that disability.

(2) If a public agency provides education to nondisabled children in any of these age groups, it must make FAPE available to at least a proportionate number of children with disabilities of the same age.

(3) If a public agency provides education to 50 percent or more of its children with disabilities in any disability category in any of these age groups, it must make FAPE available to all its children with disabilities of the same age who have that disability. This provision does not apply to children aged 3 through 5 for any fiscal year for which the State receives a grant under section 619(a)(1) of the Act.

(4) If a public agency provides education to a child with a disability in any of these age groups, it must make FAPE available to that child and provide that child and his or her parents all of the rights under Part B of the Act and this part.

(5) A State is not required to make FAPE available to a child with a disability in one of these age groups if—

(i) State law expressly prohibits, or does not authorize, the expenditure of public funds to provide education to nondisabled children in that age group; or

(ii) The requirement is inconsistent with a court order that governs the provision of free public education to children with disabilities in that State.

(c) *Children aged 3 through 21 on reservations.* With the exception of children identified in § 300.709(a)(1) and (2), the SEA shall be responsible for ensuring that all of the requirements of Part B of the Act are implemented for all children aged 3 through 21 on reservations.

(Authority: 20 U.S.C. §§ 1411(f); 1412(2)(B); S. Rep. No. 94-168, p. 19 (1975))

Note 1: The requirement to make FAPE available applies to all children with disabilities within the State who are in the age ranges required under § 300.300 and who need special education and related services. This includes children with disabilities already in school and children with less severe disabilities, who are not covered under the priorities under § 300.321.

Note 2: In order to be in compliance with § 300.300, each State must ensure that the requirement to identify, locate, and evaluate all children with disabilities is fully implemented by public agencies throughout the State. This means that before September 1, 1978, every child who has been referred or is on a waiting list for evaluation (including children in school as well as those not receiving an education) must be evaluated in accordance with §§ 300.530-300.533. If, as a result of the evaluation, it is determined that a child needs special education and related services, an IEP must be developed for the child by September 1, 1978, and all other applicable requirements of this part must be met.

Note 3: The requirement to identify, locate, and evaluate children with disabilities (commonly referred to as the "child find system") was enacted on August 21, 1974, under Pub. L. 93-380. While each State needed time to establish and implement its child find system, the four year period between August 21, 1974, and September 1, 1978, is considered to be sufficient to ensure that the system is fully operational and effective on a State-wide basis.

Under the statute, the age range for the child find requirement (0-21) is greater than the mandated age range for providing FAPE. One reason for the broader age requirement under "child find" is to enable States to be aware of and plan for younger children who will require special education and related services. It also ties in with the full educational opportunity goal requirement that has the same age range as child find. Moreover, while a State is not required to provide FAPE to children with disabilities below the age ranges mandated under § 300.300, the State may, at its discretion, extend services to those children, subject to the priority requirements of §§ 300.320-300.324.

§ 300.301 Free appropriate public education—methods and payments.

(a) Each State may use whatever State, local, Federal, and private sources of support are available in the State to meet the requirements of this part. For example, when it is necessary to place a child with a disability in a residential facility, a State could use joint agreements between the agencies involved for sharing the cost of that placement.

(b) Nothing in this part relieves an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a child with a disability.

(Authority: 20 U.S.C. §§ 1401 (18), 1412(2)(B))

§ 300.302 Residential placement.

If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

(Authority: 20 U.S.C. §§ 1412(2)(B); 1413(a)(4)(B))

Note: This requirement applies to placements that are made by public agencies for educational purposes, and includes placements in State-operated schools for children with disabilities, such as a State school for students with deafness or students with blindness.

§ 300.303 Proper functioning of hearing aids.

Each public agency shall ensure that the hearing aids worn by children with hearing impairments including deafness in school are functioning properly.

(Authority: 20 U.S.C. § 1412(2)(B))

Note: The report of the House of Representatives on the 1978 appropriation bill includes the following statement regarding hearing aids:

In its report on the 1976 appropriation bill the Committee expressed concern about the condition of hearing aids worn by children in public schools. A study done at the Committee's direction by the Bureau of Education for the Handicapped reveals that up to one-third of the hearing aids are malfunctioning. Obviously, the Committee expects the Office of Education will ensure that hearing impaired school children are receiving adequate professional assessment, follow-up and services.

(Authority: H.R. Rep. No. 95-381, p. 67 (1977))

§ 300.304 Full educational opportunity goal.

(a) Each SEA shall ensure that each public agency establishes and implements a goal of providing full educational opportunity to all children with disabilities in the area served by the public agency.

(b) Subject to the priority requirements of §§ 300.320-300.324 an SEA or LEA may use Part B funds to provide facilities, personnel, and services necessary to meet the full educational opportunity goal.

(Authority: 20 U.S.C. §§ 1412(2)(A); 1414(a)(1)(C))

Note: In meeting the full educational opportunity goal, the Congress also encouraged LEAs to include artistic and cultural activities in programs supported under this part, subject to the priority requirements of §§ 300.320-300.324. This point is addressed in the following statements from the Senate Report on Public Law 94-142:

> The use of the arts as a teaching tool for the handicapped has long been recognized as a viable, effective way not only of teaching special skills, but also of reaching youngsters who had otherwise been unteachable. The Committee envisions that programs under this bill could well include an arts component and, indeed, urges that local educational agencies include the arts in programs for the handicapped funded under this Act. Such a program could cover both appreciation of the arts by the handicapped youngsters, and the utilization of the arts as a teaching tool per se.
>
> Museum settings have often been another effective tool in the teaching of handicapped children. For example, the Brooklyn Museum has been a leader in developing exhibits utilizing the heightened tactile sensory skill of the blind. Therefore, in light of the national policy concerning the use of museums in federally supported education programs enunciated in the Education Amendments of 1974, the Committee also urges local educational agencies to include museums in programs for the handicapped funded under this Act.

(Authority: S. Rep. No. 94-168, p. 13 (1975))

§ 300.305 Program options.

Each public agency shall take steps to ensure that its children with disabilities have available to them the variety of educational programs and services available to nondisabled children in the area served by the agency, including art, music, industrial arts, consumer and homemaking education, and vocational education.

(Authority: 20 U.S.C. §§ 1412(2)(A); 1414(a)(1)(C))

Note: The above list of program options is not exhaustive, and could include any program or activity in which nondisabled students participate.

§ 300.306 Nonacademic services

(a) Each public agency shall take steps to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford children with disabilities an equal opportunity for participation in those services and activities.

(b) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the public agency and assistance in making outside employment available.

(Authority: 20 U.S.C. §§ 1412(2)(A); 1414(a)(1)(C))

§ 300.307 Physical education.

(a) *General.* Physical education services, specially designed if necessary, must be made available to every child with a disability receiving FAPE.

(b) *Regular physical education.* Each child with a disability must be afforded the opportunity to participate in the regular physical education program available to nondisabled children unless—

(1) The child is enrolled full time in a separate facility; or

(2) The child needs specially designed physical education, as prescribed in the child's IEP.

(c) *Special physical education.* If specially designed physical education is prescribed in a child's IEP, the public agency responsible for the education of that child shall provide the services directly, or make arrangements for those services to be provided through other public or private programs.

(d) *Education in separate facilities.* The public agency responsible for the education of a child with a disability who is enrolled in a separate facility shall ensure that the child receives appropriate physical education services in compliance with paragraphs (a) and (c) of this section.

(Authority: 20 U.S.C. §§ 1401(a)(16); 1412(5)(B); 1414(a)(6))

Note: The Report of the House of Representatives on Public Law 94-142 includes the following statement regarding physical education:

> Special education as set forth in the Committee bill includes instruction in physical education, which is provided as a matter of course to all non-handicapped children enrolled in public elementary and secondary schools. The Committee is concerned that although these services are available to and required of all children in our school systems, they are often viewed as a luxury for handicapped children.

* * * * *

The Committee expects the Commissioner of Education to take whatever action is necessary to assure that physical education services are available to all handicapped children, and has specifically included physical education within the definition of special education to make clear that the Committee expects such services, specially designed where necessary, to be provided as an integral part of the educational program of every handicapped child.

(Authority: H. R. Rep. No. 94-332, p. 9 (1975))

§ 300.308 Assistive technology.

Each public agency shall ensure that assistive technology devices or assistive technology services, or both, as those terms are defined in §§ 300.5-300.6, are made available to a child with a disability if required as a part of the child's—

(a) Special education under § 300.17;

(b) Related services under § 300.16; or

(c) Supplementary aids and services under § 300.550(b)(2).

(Authority: 20 U.S.C. § 1412(2), (5)(B))

Priorities in the Use of Part B Funds

§ 300.320 Definitions of first priority children and second priority children.

For the purposes of §§ 300.321-300.324, the term:

(a) "First priority children" means children with disabilities who—

(1) Are in an age group for which the State must make FAPE available under § 300.300; and

(2) Are not receiving any education.

(b) "Second priority children" means children with disabilities, within each disability category, with the most severe disabilities who are receiving an inadequate education.

(Authority: 20 U.S.C. § 1412(3))

Note 1: After September 1, 1978, there should be no second priority children, since States must ensure, as a condition of receiving Part B funds for fiscal year 1979, that all children with disabilities will have FAPE available by that date.

Note 2: The term "free appropriate public education," as defined in § 300.8, means special education and related services that * * * "are provided in conformity with an IEP" * * *.

New first priority children will continue to be found by the State after September 1, 1978 through on-going efforts to identify, locate, and evaluate all children with disabilities.

§ 300.321 Priorities.

(a) Each SEA and LEA shall use funds provided under part B of the Act in the following order of priorities:

(1) To provide FAPE to first priority children, including the identification, location, and evaluation of first priority children.

(2) To provide FAPE to second priority children, including the identification, location, and evaluation of second priority children.

(3) To meet the other requirements of this part.

(b) The requirements of paragraph (a) of this section do not apply to funds that the State uses for administration under § 300.620.

(Authority: 20 U.S.C. § 1411(b)(1)(B), (b)(2)(B), (c)(1)(B), (c)(2)(A)(ii))

Note: SEAs as well as LEAs must use part B funds (except the portion used for State administration) for the priorities. A State may have to set aside a portion of its part B allotment to be able to serve newly identified first priority children.

After September 1, 1978, part B funds may be used—

(1) To continue supporting child identification, location, and evaluation activities;

(2) To provide FAPE to newly identified first priority children;

(3) To meet the full educational opportunity goal required under § 300.304, including employing additional personnel and providing inservice training, in order to increase the level, intensity, and quality of services provided to individual children with disabilities; and

(4) To meet the other requirements of part B.

§ 300.322 [Reserved]

§ 300.323 Services to other children.

If a State or an LEA is providing FAPE to all of its first priority children, that State or LEA may use funds provided under part B of the Act—

(a) To provide FAPE to children with disabilities who are not receiving any education and who are in the age groups not covered under § 300.300 in that State; or

(b) To provide FAPE to second priority children; or

(c) Both.

(Authority: 20 U.S.C. § 1411 (b)(1)(B), (b)(2)(B), (c)(2)(A)(ii))

§ 300.324 Application of local educational agency to usefunds for the second priority.

An LEA may use funds provided under part B of the Act for second priority children, if it provides assurance satisfactory to the SEA in its application (or an amendment to its application)—

(a) That all first priority children have FAPE available to them;

(b) That the LEA has a system for the identification, location, and evaluation of children with disabilities, as described in its application; and

(c) That whenever a first priority child is identified, located, and evaluated, the LEA makes FAPE available to the child.

(Authority: 20 U.S.C. §§ 1411(b)(1)(B), (c)(1)(B); 1414(a)(1)(C)(ii))

Individualized Education Programs

§ 300.340 Definitions.

(a) As used in this part, the term "individualized education program" means a written statement for a child with a disability that is developed and implemented in accordance with §§ 300.341-300.350.

(b) As used in §§ 300.346 and 300.347, "participating agency" means a State or local agency, other than the public agency responsible for a student's education, that is financially and legally responsible for providing transition services to the student.

(Authority: 20 U.S.C. § 1401(a)(20))

§ 300.341 State educational agency responsibility.

(a) *Public agencies.* The SEA shall ensure that each public agency develops and implements an IEP for each of its children with disabilities.

(b) *Private schools and facilities.* The SEA shall ensure that an IEP is developed and implemented for each child with a disability who—

(1) Is placed in or referred to a private school or facility by a public agency; or

(2) Is enrolled in a parochial school or other private school and receives special education or related services from a public agency.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. §§ 1412(4), (6); 1413(a)(4))

Note: This section applies to all public agencies, including other State agencies (e.g., departments of mental health and welfare) that provide special education to a child with a disability either directly, by contract or through other arrangements. Thus, if a State welfare agency contracts with a private school or facility to provide special education to a child with a disability, that agency would be responsible for ensuring that an IEP is developed for the child.

§ 300.342 When individualized education programs must be in effect.

(a) At the beginning of each school year, each public agency shall have in effect an IEP for every child with a disability who is receiving special education from that agency.

(b) An IEP must—

(1) Be in effect before special education and related services are provided to a child; and

(2) Be implemented as soon as possible following the meetings under § 300.343.

(Authority: 20 U.S.C. §§ 1412(2)(B), (4), (6); 1414(a)(5); Pub. L. 94-142, sec. 8(c) (1975))

Note: Under paragraph (b)(2) of this section, it is expected that the IEP of a child with a disability will be implemented immediately following the meetings under § 300.343. An exception to this would be (1) when the meetings occur during the summer or a vacation period, or (2) where there are circumstances that require a short delay (e.g., working out transportation arrangements). However, there can be no undue delay in providing special education and related services to the child.

§ 300.343 Meetings.

(a) *General.* Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising the IEP of a child with a disability (or, if consistent with State policy and at the discretion of the LEA, and with the concurrence of the parents, an individualized family service plan described in section 677(d) of the Act for each child with a disability, aged 3 through 5).

(b) [Reserved]

(c) *Timeline.* A meeting to develop an IEP for a child must be held within 30 calendar days of a determination that the child needs special education and related services.

(d) *Review.* Each public agency shall initiate and conduct meetings to review each child's IEP periodically and, if appropriate, revise its provisions. A meeting must be held for this purpose at least once a year.

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(Authority: 20 U.S.C. §§ 1412(2)(B), (4), (6); 1414(a)(5))

Note: The date on which agencies must have IEPs in effect is specified in § 300.342 (the beginning of each school year). However, except for new children with disabilities (i.e., those evaluated and determined to need special education and related services for the first time), the timing of meetings to develop, review, and revise IEPs is left to the discretion of each agency.

In order to have IEPs in effect at the beginning of the school year, agencies could hold meetings either at the end of the preceding school year or during the summer prior to the next school year. Meetings may be held any time throughout the year, as long as IEPs are in effect at the beginning of each school year.

The statute requires agencies to hold a meeting at least once each year in order to review and, if appropriate, revise each child's IEP. The timing of those meetings could be on the anniversary date of the child's last IEP meeting, but this is left to the discretion of the agency.

§ 300.344 Participants in meetings.

(a) *General.* The public agency shall ensure that each meeting includes the following participants:

(1) A representative of the public agency, other than the child's teacher, who is qualified to provide, or supervise the provision of, special education.

(2) The child's teacher.

(3) One or both of the child's parents, subject to § 300.345.

(4) The child, if appropriate.

(5) Other individuals at the discretion of the parent or agency.

(b) *Evaluation personnel.* For a child with a disability who has been evaluated for the first time, the public agency shall ensure—

(1) That a member of the evaluation team participates in the meeting; or

(2) That the representative of the public agency, the child's teacher, or some other person is present at the meeting, who is knowledgeable about the evaluation procedures used with the child and is familiar with the results of the evaluation.

(c) *Transition services participants.*

(1) If a purpose of the meeting is the consideration of transition services for a student, the public agency shall invite—

(i) The student; and

(ii) A representative of any other public agency that is likely to be responsible for providing or paying for transition services.

(2) If the student does not attend, the public agency shall take other steps to ensure that the student's preferences and interests are considered; and

(3) If an agency invited to send a representative to a meeting does not do so, the public agency shall take other steps to obtain the participation of the other agency in the planning of any transition services.

(Authority: 20 U.S.C. §§ 1401(a)(19), (a)(20); 1412(2)(B), (4), (6); 1414(a)(5))

Note 1: In deciding which teacher will participate in meetings on a child's IEP, the agency may wish to consider the following possibilities:

(a) For a child with a disability who is receiving special education, the teacher could be the child's special education teacher. If the child's disability is a speech impairment, the teacher could be the speech-language pathologist.

(b) For a child with a disability who is being considered for placement in special education, the teacher could be the child's regular teacher, or a teacher qualified to provide education in the type of program in which the child may be placed, or both.

(c) If the child is not in school or has more than one teacher, the agency may designate which teacher will participate in the meeting.

Either the teacher or the agency representative should be qualified in the area of the child's suspected disability.

For a child whose primary disability is a speech or language impairment, the evaluation personnel participating under paragraph (b)(1) of this section would normally be the speech-language pathologist.

Note 2: Under paragraph (c) of this section, the public agency is required to invite each student to participate in his or her IEP meeting, if a purpose of the meeting is the consideration of transition services for the student. For all students who are 16 years of age or older, one of the purposes of the annual meeting will always be the planning of transition services, since transition services are a required component of the IEP for these students.

For a student younger than age 16, if transition services are initially discussed at a meeting that does not include the student, the public agency is responsible for ensuring that, before a decision about transition services for a student is made, a subsequent IEP meeting is conducted for that purpose, and the student is invited to the meeting.

§ 300.345 Parent participation.

(a) Each public agency shall take steps to ensure that one or both of the parents of the child with a disability are present at each meeting or are afforded the opportunity to participate, including—

(1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

(b)(1) The notice under paragraph (a)(1) of this section must indicate the purpose, time, and location of the meeting and who will be in attendance;

(2) If a purpose of the meeting is the consideration of transition services for a student, the notice must also—

(i) Indicate this purpose;

(ii) Indicate that the agency will invite the student; and

(iii) Identify any other agency that will be invited to send a representative.

(c) If neither parent can attend, the public agency shall use other methods to ensure parent participation, including individual or conference telephone calls.

(d) A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case the public agency must have a record of its attempts to arrange a mutually agreed on time and place such as—

(1) Detailed records of telephone calls made or attempted and the results of those calls;

(2) Copies of correspondence sent to the parents and any responses received; and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) The public agency shall take whatever action is necessary to ensure that the parent understands the proceedings at a meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English.

(f) The public agency shall give the parent, on request, a copy of the IEP.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. §§ 1401(a)(20); 1412(2)(B), (4), (6); 1414(a)(5))

Note: The notice in paragraph (a) of this section could also inform parents that they may bring other people to the meeting. As indicated in paragraph (c) of this section, the procedure used to notify parents (whether oral or written or both) is left to the discretion of the agency, but the agency must keep a record of its efforts to contact parents.

§ 300.346 Content of individualized education program.

(a) *General.* The IEP for each child must include—

(1) A statement of the child's present levels of educational performance;

(2) A statement of annual goals, including short-term instructional objectives;

(3) A statement of the specific special education and related services to be provided to the child and the extent that the child will be able to participate in regular educational programs;

(4) The projected dates for initiation of services and the anticipated duration of the services; and

(5) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.

(b) *Transition services.*

(1) The IEP for each student, beginning no later than age 16 (and at a younger age, if determined appropriate), must include a statement of the needed transition services as defined in § 300.18, including, if appropriate, a statement of each public agency's and each participating agency's responsibilities or linkages, or both, before the student leaves the school setting.

(2) If the IEP team determines that services are not needed in one or more of the areas specified in § 300.18 (b)(2)(i) through (b)(2)(iii), the IEP must include a statement to that effect and the basis upon which the determination was made.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. §§ 1401 (a)(19), (a)(20); 1412 (2)(B), (4), (6); 1414(a)(5))

Note 1: The legislative history of the transition services provisions of the Act suggests that the statement of needed transition services referred to in paragraph (b) of this section should include a commitment by any participating agency to meet any financial responsibility it may have in the provision of transition services. See House Report No. 101-544, p. 11 (1990).

Note 2: With respect to the provisions of paragraph (b) of this section, it is generally expected that the statement of needed transition services will include the areas listed in § 300.18 (b)(2)(i) through (b)(2)(iii). If the IEP team determines that services are not needed in one of those areas, the public agency must implement the requirements in paragraph (b)(2) of this section. Since it is a part of the IEP, the IEP team must reconsider its determination at least annually.

Note 3: Section 602(a)(20) of the Act provides that IEPs must include a statement of needed transition services for students beginning no later than age 16, but permits transition services to students below age 16 (i.e., "* * * and, when determined appropriate for the individual, beginning at 14 or younger.") Although the statute does not mandate transition services for all students beginning at age 14 or younger, the provision of these services could have a significantly positive effect on the employment and independent living outcomes for many of these students in the future, especially for students who are likely to drop out before age 16. With respect to the provision of transition services to students below age 16, the Report of the House Committee on Education and Labor on Public Law 101-476 includes the following statement:

> Although this language leaves the final determination of when to initiate transition services for students under age 16 to the IEP process, it nevertheless makes clear that Congress expects consideration to be given to the need for transition services for some students by age 14 or younger. The Committee encourages that approach because of their concern that age 16 may be too late for many students, particularly those at risk of dropping out of school and those with the most severe disabilities. Even for those students who stay in school until age 18, many will need more than two years of transitional services. Students with disabilities are now dropping out of school before age 16, feeling that the education system has little to offer them. Initiating services at a younger age will be critical. (House Report No. 101-544, 10 (1990).)

§ 300.347 Agency responsibilities for transition services.

(a) If a participating agency fails to provide agreed-upon transition services contained in the IEP of a student with a disability, the public agency responsible for the student's education shall, as soon as possible, initiate a meeting for the purpose of identifying alternative strategies to meet the transition objectives and, if necessary, revising the student's IEP.

(b) Nothing in this part relieves any participating agency, including a State vocational rehabilitation agency, of the responsibility to provide or pay for any transition service that the agency would otherwise provide to students with disabilities who meet the eligibility criteria of that agency.

(Authority: 20 U.S.C. §§ 1401 (a)(18), (a)(19), (a)(20); 1412(2)(B))

§ 300.348 Private school placements by public agencies.

(a) *Developing individualized education programs.*

(1) Before a public agency places a child with a disability in, or refers a child to, a private school or facility, the agency shall initiate and conduct a meeting to develop an IEP for the child in accordance with § 300.343.

(2) The agency shall ensure that a representative of the private school or facility attends the meeting. If the representative cannot attend, the agency shall use other methods to ensure participation by the private school or facility, including individual or conference telephone calls.

(3) [Reserved]

(b) *Reviewing and revising individualized education programs.*

(1) After a child with a disability enters a private school or facility, any meetings to review and revise the child's IEP may be initiated and conducted by the private school or facility at the discretion of the public agency.

(2) If the private school or facility initiates and conducts these meetings, the public agency shall ensure that the parents and an agency representative:

(i) Are involved in any decision about the child's IEP; and

(ii) Agree to any proposed changes in the program before those changes are implemented.

(c) *Responsibility.* Even if a private school or facility implements a child's IEP, responsibility for compliance with this part remains with the public agency and the SEA.

(Authority: 20 U.S.C. § 1413(a)(4)(B))

§ 300.349 Children with disabilities in parochial or other private schools.

If a child with a disability is enrolled in a parochial or other private school and receives special education or related services from a public agency, the public agency shall—

(a) Initiate and conduct meetings to develop, review, and revise an IEP for the child, in accordance with § 300.343; and

(b) Ensure that a representative of the parochial or other private school attends each meeting. If the representative cannot attend, the agency shall use other methods to ensure participation by the private school, including individual or conference telephone calls.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1413(a)(4)(A))

§ 300.350 Individualized education program—accountability.

Each public agency must provide special education and related services to a child with a disability in accordance with an IEP. However, Part B of the Act does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and objectives.

(Authority: 20 U.S.C. §§ 1412(2)(B); 1414(a)(5), (6); Cong. Rec. at H7152 (daily ed., July 21, 1975))

Note: This section is intended to relieve concerns that the IEP constitutes a guarantee by the public agency and the teacher that a child will progress at a specified rate. However, this section does not relieve agencies and teachers from making good faith efforts to assist the child in achieving the goals and objectives listed in the IEP. Further, the section does not limit a parent's right to complain and ask for revisions of the child's program, or to invoke due process procedures, if the parent feels that these efforts are not being made.

Direct Service by the State Educational Agency

§ 300.360 Use of local educational agency allocation for direct services.

(a) An SEA may not distribute funds to an LEA, and shall use those funds to ensure the provision of FAPE to children with disabilities residing in the area served by the LEA, if the LEA, in any fiscal year

(1) Is entitled to less than $7,500 for that fiscal year (beginning with fiscal year 1979);

(2) Does not submit an application that meets the requirements of §§ 300.220-300.240;

(3) Is unable or unwilling to establish and maintain programs of FAPE;

(4) Is unable or unwilling to be consolidated with other LEAs in order to establish and maintain those programs; or

(5) Has one or more children with disabilities who can best be served by a regional or State center designed to meet the needs of those children.

(b) In meeting the requirements in paragraph (a) of this section, the SEA may provide special education and related services directly, by contract, or through other arrangements.

(c) The excess cost requirements of §§ 300.182-300.186 do not apply to the SEA.

(Authority: 20 U.S.C. §§ 1411(c)(4); 1413(b); 1414(d))

Note: Section 300.360 is a combination of three provisions in the statute (Sections 611(c)(4); 613(b); and 614(d)). This section focuses mainly on the State's administration and use of local entitlements under Part B.

The SEA, as a recipient of Part B funds, is responsible for ensuring that all public agencies in the State comply with the provisions of the Act, regardless of whether they receive Part B funds. If an LEA elects not to apply for its Part B entitlement, the State would be required to use those funds to ensure that FAPE is made available to children residing in the area served by that local agency. However, if the local entitlement is not sufficient for this purpose, additional State or local funds would have to be expended in order to ensure that FAPE and the other requirements of the Act are met.

Moreover, if the LEA is the recipient of any other Federal funds, if would have to be in compliance with 34 CFR §§ 104.31-104.39 of the regulations implementing Section 504 of the Rehabili-tation Act of 1973. It should be noted that the term "FAPE" has different meanings under Part B and Section 504. For example, under Part B, FAPE is a statutory term that requires special education and related services to be provided in accordance with an IEP. However, under Section 504, each recipient must provide an education that includes services that are "designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met * * *" Those regulations state that implementation of an IEP, in accordance with Part B, is one means of meeting the FAPE requirement.

§ 300.361 Nature and location of services.

The SEA may provide special education and related services under § 300.360(a) in the manner and at the location it considers appropriate. However, the manner in which the education and services are provided must be consistent with the requirements of this part (including the LRE provisions of §§ 300.550-300.556).

(Authority: 20 U.S.C. § 1414(d))

§ 300.370 Use of State agency allocations.

(a) The State may use the portion of its allocation that it does not use for administration under § 300.620-300.621

(1) For support services and direct services in accordance with the priority requirements of §§ 300.320-300.324; and

(2) For the administrative costs of the State's monitoring activities and complaint investigations, to the extent that these costs exceed the administrative costs for monitoring and complaint investigations incurred during fiscal year 1985.

(b) For the purposes of paragraph (a) of this section

(1) "Direct services" means services provided to a child with a disability by the State directly, by contract, or through other arrangements; and

(2) "Support services" includes implementing the comprehensive system of personnel development of §§ 300.380-300.383, recruitment and training of hearing officers and surrogate parents, and public information and parent training activities relating to FAPE for children with disabilities.

(Authority: 20 U.S.C. § 1411 (b)(2), (c)(2))

§ 300.371 State matching.

Beginning with the period July 1, 1978 - June 30, 1979, and for each following fiscal year, the funds that a State uses for direct and support services under § 300.370 must be matched on a program basis by the State from funds other than Federal funds. This requirement does not apply to funds that a State uses under § 300.360.

(Authority: 20 U.S.C. § 1411(c)(2)(B), (c)(4)(B))

Note: The requirement in § 300.371 would be satisfied if the State can document that the amount of State funds expended for each major program area (e.g., the comprehensive system of personnel development) is at least equal to the expenditure of Federal funds in that program area.

§ 300.372 Applicability of nonsupplanting requirement.

Beginning with funds appropriated for fiscal year 1979 and for each following fiscal year, the requirement in section 613(a)(9) of the Act, which prohibits supplanting with Federal funds, does not apply to funds that the State uses from its allocation under § 300.706(a) for administration, direct services, or support services.

(Authority: 20 U.S.C. § 1411(c)(3))

Comprehensive System of Personnel Development

§ 300.380 General.

Each State shall—

(a) Develop and implement a comprehensive system of personnel development that—

(1) Is consistent with the purposes of the Act and with the comprehensive system of personnel development described in 34 CFR § 303.360;

(2) Meets the requirements in §§ 300.381-300.383; and

(3) Is consistent with the provisions on personnel standards in § 300.153; and

(b) Include in its State plan a description of the personnel development system required in paragraph (a)(1) of this section.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1413 (a)(3), (a)(14))

§ 300.381 Adequate supply of qualified personnel.

Each State plan must include a description of the procedures and activities the State will undertake to ensure an adequate supply of qualified personnel (as the term "qualified" is defined at § 300.15), including special education and related services personnel and leadership personnel, necessary to carry out the purposes of this part. The procedures and activities must include the development, updating, and implementation of a plan that—

(a) Addresses current and projected special education and related services personnel needs, including the need for leadership personnel; and

(b) Coordinates and facilitates efforts among SEA and LEAs, institutions of higher education, and professional associations to recruit, prepare, and retain qualified personnel, including personnel from minority backgrounds, and personnel with disabilities.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1413(a)(3)(A))

§ 300.382 Personnel preparation and continuing education.

Each State plan must include a description of the procedures and activities the State will undertake to ensure that all personnel necessary to carry out this part are appropriately and adequately prepared. The procedures and activities must include—

(a) A system for the continuing education of regular and special education and related services personnel to enable these personnel to meet the needs of children with disabilities under this part;

(b) Procedures for acquiring and disseminating to teachers, administrators, and related services personnel significant knowledge derived from education research and other sources; and

(c) Procedures for adopting, if appropriate, promising practices, materials, and technology, proven effective through research and demonstration.

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(Authority: 20 U.S.C. § 1413(a)(3)(B))

§ 300.383 Data system on personnel and personnel development.

(a) *General.* The procedures and activities required in §§ 300.381 and 300.382 must include the development and maintenance of a system for determining, on an annual basis, the data required in paragraphs (b) and (c) of this section.

(b) *Data on qualified personnel.* (1) The system required by paragraph (a) of this section must enable each State to determine, on an annual basis—

(i) The number and type of personnel, including leadership personnel, employed in the provision of special education and related services, by profession or discipline;

(ii) The number and type of personnel who are employed with emergency, provisional, or temporary certification in each profession or discipline who do not hold appropriate State certification, licensure, or other credentials comparable to certification or licensure for that profession or discipline; and

(iii) The number and type of personnel, including leadership personnel, in each profession or discipline needed, and a projection of the numbers of those personnel that will be needed in five years, based on projections of individuals to be served, retirement and other departures of personnel from the field, and other relevant factors.

(2) The data on special education and related services personnel required in paragraph (b)(1) of this section must include audiologists, counselors, diagnostic and evaluation personnel, home-hospital teachers, interpreters for students with hearing impairments including deafness, occupational therapists, physical education teachers, physical therapists, psychologists, rehabilitation counselors, social workers, speech-language pathologists, teacher aides, recreation and therapeutic recreation specialists, vocational education teachers, work-study coordinators, and other instructional and noninstructional staff.

(3) The data on leadership personnel required by paragraph (b)(1) of this section must include administrators and supervisors of State or local agencies who are involved in the provision or supervision of services or activities necessary to carry out the purposes of this part.

(c) *Data on personnel development.* The system required in paragraph (a) of this section must enable each State to determine, on an annual basis, the institutions of higher education within the State that are preparing special education and related services personnel, including leadership personnel, by area of specialization, including—

(1) The numbers of students enrolled in programs for the preparation of special education and related services personnel administered by these institutions of higher education; and

(2) The numbers of students who graduated during the past year with certification or licensure, or with credentials to qualify for certification or licensure, from programs for the preparation of special education and related services personnel administered by institutions of higher education.

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(Authority: 20 U.S.C. § 1413(a)(3)(A))

§§ 300.384-300.387 [Reserved]

Subpart D—Private Schools

Children With Disabilities in Private Schools Placed or Referred by Public Agencies

§ 300.400 Applicability of §§ 300.400-300.402.

Sections of 300.401-300.402 apply only to children with disabilities who are or have been placed in or referred to a private school or facility by a public agency as a means of providing special education and related services.

(Authority: 20 U.S.C. § 1413(a)(4)(B))

§ 300.401 Responsibility of State educational agency.

Each SEA shall ensure that a child with a disability who is placed in or referred to a private school or facility by a public agency:

(a) Is provided special education and related services—

(1) In conformance with an IEP that meets the requirements of §§ 300.340-300.350;

(2) At no cost to the parents; and

(3) At a school or facility that meets the standards that apply to the SEA and LEAs (including the requirements of this part); and

(b) Has all of the rights of a child with a disability who is served by a public agency.

(Authority: 20 U.S.C. § 1413(a)(4)(B))

§ 300.402 Implementation by State educational agency.

In implementing § 300.401, the SEA shall—

(a) Monitor compliance through procedures such as written reports, on-site visits, and parent questionnaires;

(b) Disseminate copies of applicable standards to each private school and facility to which a public agency has referred or placed a child with a disability; and

(c) Provide an opportunity for those private schools and facilities to participate in the development and revision of State standards that apply to them.

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(Authority: 20 U.S.C. § 1413(a)(4)(B))

§ 300.403 Placement of children by parents.

(a) If a child with a disability has FAPE available and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under §§ 300.450-300.452.

(b) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures of §§ 300.500-300.515.

(Authority: 20 U.S.C. § 1412(2)(B); 1415)

Children With Disabilities Enrolled by Their Parents in Private Schools

§ 300.450 Definition of "private school children with disabilities."

As used in this part, "private school children with disabilities" means children with disabilities enrolled by their parents in private schools or facilities other than children with disabilities covered under §§ 300.400-300.402.

(Authority: 20 U.S.C. § 1413(a)(4)(A))

§ 300.451 State educational agency responsibility.

The SEA shall ensure that—

(a) To the extent consistent with their number and location in the State, provision is made for the participation of private school children with disabilities in the program assisted or carried out under this part by providing them with special education and related services; and

(b) The requirements of 34 CFR §§ 76.651-76.662 are met.

(Authority: 20 U.S.C. § 1413(a)(4)(A))

§ 300.452 Local educational agency responsibility.

Each LEA shall provide special education and related services designed to meet the needs of private school children with disabilities residing in the jurisdiction of the agency.

(Authority: 20 U.S.C. §§ 1413(a)(4)(A); 1414(a)(6))

Procedures for By-Pass

§ 300.480 By-Pass—general.

(a) The Secretary implements a by-pass if an SEA is, and was on December 2, 1983, prohibited by law from providing for the participation of private school children with disabilities in the program assisted or carried out under this part, as required by section 613(a)(4)(A) of the Act and by §§ 300.451-300.452.

(b) The Secretary waives the requirement of section 613(a)(4)(A) of the Act and of §§ 300.451-300.452 if the Secretary implements a by-pass.

(Authority: 20 U.S.C. § 1413(d)(1))

§ 300.481 Provisions for services under a by-pass.

(A) Before implementing a by-pass, the Secretary consults with appropriate public and private school officials, including SEA officials, in the affected State to consider matters such as—

(1) The prohibition imposed by State law that results in the need for a by-pass;

(2) The scope and nature of the services required by private school children with disabilities in the State and the number of children to be served under the by-pass; and

(3) The establishment of policies and procedures to ensure that private school children with disabilities receive services consistent with the requirements of section 613(a)(4)(A) of the Act, §§ 300.451-300.452, and 34 CFR §§ 76.651-76.662.

(b) After determining that a by-pass is required, the Secretary arranges for the provision of services to private school children with disabilities in the State in a manner consistent with the requirements of section 613(a)(4)(A) of the Act and §§ 300.451-300.452 by providing services through one or more agreements with appropriate parties.

(c) For any fiscal year that a by-pass is implemented, the Secretary determines the maximum amount to be paid to the providers of services by multiplying—

(1) A per child amount that may not exceed the amount per child provided by the Secretary under this part for all children with disabilities in the State for the preceding fiscal year; by

(2) The number of private school children with disabilities (as defined by §§ 300.7(a) and 300.450) in the State, as determined by the Secretary on the basis of

the most recent satisfactory data available, which may include an estimate of the number of those children with disabilities.

(d) The Secretary deducts from the State's allocation under this part the amount the Secretary determines is necessary to implement a by-pass and pays that amount to the provider of services. The Secretary may withhold this amount from the State's allocation pending final resolution of any investigation or complaint that could result in a determination that a by-pass must be implemented.

(Authority: 20 U.S.C. § 1413(d)(2))

Due Process Procedures

Source: Sections 300.482 through 300.486 appear at 49 FR 48526, Dec. 12, 1984, unless otherwise noted.

§ 300.482 Notice of intent to implement a by-pass.

(a) Before taking any final action to implement a by-pass, the Secretary provides the affected SEA with written notice.

(b) In the written notice, the Secretary—

(1) States the reasons for the proposed by-pass in sufficient detail to allow the SEA to respond; and

(2) Advises the SEA that it has a specific period of time (at least 45 days) from receipt of the written notice to submit written objections to the proposed by-pass and that it may request in writing the opportunity for a hearing to show cause why a by-pass should not be implemented.

(c) The Secretary sends the notice to the SEA by certified mail with return receipt requested.

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(Authority: 20 U.S.C. § 1413(d)(3)(A))

§ 300.483 Request to show cause.

An SEA seeking an opportunity to show cause why a by-pass should not be implemented shall submit a written request for a show cause hearing to the Secretary.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1413(d)(3)(A))

§ 300.484 Show cause hearing.

(a) If a show cause hearing is requested, the Secretary—

(1) Notifies the SEA and other appropriate public and private school officials of the time and place for the hearing; and

(2) Designates a person to conduct the show cause hearing. The designee must not have had any responsibility for the matter brought for a hearing.

(b) At the show cause hearing, the designee considers matters such as—

(1) The necessity for implementing a by-pass;

(2) Possible factual errors in the written notice of intent to implement a by-pass; and

(3) The objections raised by public and private school representatives.

(c) The designee may regulate the course of the proceedings and the conduct of parties during the pendency of the proceedings. The designee takes all steps necessary to conduct a fair and impartial proceeding, to avoid delay, and to maintain order.

(d) The designee may interpret applicable statutes and regulations, but may not waive them or rule on their validity.

(e) The designee arranges for the preparation, retention, and, if appropriate, dissemination of the record of the hearing.

(Authority: 20 U.S.C. § 1413(d)(3)(A))

§ 300.485 Decision.

(a) The designee who conducts the show cause hearing—

(1) Issues a written decision that includes a statement of findings; and

(2) Submits a copy of the decision to the Secretary and sends a copy to each party by certified mail with return receipt requested.

(b) Each party may submit comments and recommendations on the designee's decision to the Secretary within 15 days of the date the party receives the designee's decision.

(c) The Secretary adopts, reverses, or modifies the designee's decision and notifies the SEA of the Secretary's final action. That notice is sent by certified mail with return receipt requested.

(Authority: 20 U.S.C. § 1413(d)(3)(A))

§ 300.486 Filing requirements.

(a) Any written submission under §§ 300.482-300.485 must be filed by hand-delivery, by mail, or by facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(b) The filing date under paragraph (a) of this section is the date the document is—

(1) Hand-delivered;

(2) Mailed; or

(3) Sent by facsimile transmission.

(c) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was received by the Department.

(d) If a document is filed by facsimile transmission, the Secretary or the hearing officer, as applicable, may require the filing of a follow-up hard copy by hand-delivery or by mail within a reasonable period of time.

(e) If agreed upon by the parties, service of a document may be made upon the other party by facsimile transmission.

(Authority: 20 U.S.C. § 1413(d)(3)(A))

§ 300.487 Judicial review.

If dissatisfied with the Secretary's final action, the SEA may, within 60 days after notice of that action, file a petition for review with the United States court of appeals for the circuit in which the State is located. The procedures for judicial review are described in section 613(d)(3)(B)-(D) of the Act.

(Authority: 20 U.S.C. § 1413(d)(3)(B)-(D))

Subpart E—Procedural Safeguards

Due Process Procedures for Parents and Children

§ 300.500 Definitions of "consent," "evaluation," and "personally identifiable."

(a) As used in this part: "Consent" means that—

(1) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;

(2) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and

(3) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

(b) "Evaluation" means procedures used in accordance with §§ 300.530-300.534 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs. The term means procedures used selectively with an individual child and does not include basic tests administered to or procedures used with all children in a school, grade, or class.

(c) "Personally identifiable" means that information includes—

(1) The name of the child, the child's parent, of other family member;

(2) The address of the child;

(3) A personal identifier, such as the child's social security number or student number; or

(4) A list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

(Authority: 20 U.S.C. §§ 1415, 1417(c))

§ 300.501 General responsibility of public agencies.

Each SEA shall ensure that each public agency establishes and implements procedural safeguards that meet the requirements of §§ 300.500-300.515.

(Authority: 20 U.S.C. § 1415(a))

§ 300.502 Opportunity to examine records.

The parents of a child with a disability shall be afforded, in accordance with the procedures of §§ 300.562-300.569, an opportunity to inspect and review all education records with respect to—

(a) The identification, evaluation, and educational placement of the child; and

(b) The provision of FAPE to the child.

(Authority: 20 U.S.C. § 1415(b)(1)(A))

§ 300.503 Independent educational evaluation.

(a) *General.* (1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) Each public agency shall provide to parents, on request, information about where an independent educational evaluation may be obtained.

(3) For the purposes of this part:

(i) "Independent educational evaluation" means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.

(ii) "Public expense" means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with § 300.301.

(b) *Parent right to evaluation at public expense.* A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. However, the public agency may initiate a hearing under § 300.506 to show that its evaluation is appropriate. If the final decision is that the evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(c) *Parent initiated evaluations.* If the parent obtains an independent education evaluation at private expense, the results of the evaluation—

(1) Must be considered by the public agency in any decision made with respect to the provision of FAPE to the child; and

(2) May be presented as evidence at a hearing under this subpart regarding that child.

(d) *Requests for evaluations by hearing officers.* If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

(e) *Agency criteria.* Whenever an independent evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria which the public agency uses when it initiates an evaluation.

(Authority: 20 U.S.C. § 1415(b)(1)(A))

§ 300.504 Prior notice; parent consent.

(a) *Notice.* Written notice that meets the requirements of § 300.505 must be given to the parents of a child with a disability a reasonable time before the public agency—

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

(b) *Consent; procedures if a parent refuses consent.* (1) Parental consent must be obtained before—

(i) Conducting a preplacement evaluation; and

(ii) Initial placement of a child with a disability in a program providing special education and related services.

(2) If State law requires parental consent before a child with a disability is evaluated or initially provided special education and related services, State procedures govern the public agency in overriding a parent's refusal to consent.

(3) If there is no State law requiring consent before a child with a disability is evaluated or initially provided special education and related services, the public agency may use the hearing procedures in §§ 300.506-300.508 to determine if the child may be evaluated or initially provided special education and related services without parental consent. If it does so and the hearing officer upholds the agency, the agency may evaluate or initially provide special education and related services to the child without the parent's consent, subject to the parent's rights under §§ 300.510-300.513.

(c) *Additional State consent requirements.* In addition to the parental consent requirements described in paragraph (b) of this section, a State may require parental consent for other services and activities under this part if it ensures that each public agency in the State establishes and implements effective procedures to ensure that a parent's refusal to consent does not result in a failure to provide the child with FAPE.

(d) *Limitation.* A public agency may not require parental consent as a condition of any benefit to the parent or the child except for the service or activity for which consent is required under paragraphs (b) or (c) of this section.

(Authority: 20 U.S.C. §§ 1415(b)(1)(C), (D); 1412(2), (6))

Note 1: Any changes in a child's special education program after the initial placement are not subject to the parental consent requirements in paragraph (b)(1) of this section, but are subject to the prior notice requirement in paragraph (a) of this section and the IEP requirements of §§ 300.340-300.350.

Note 2: Paragraph (b)(2) of this section means that if State law requires parental consent before evaluation or before special education and related services are initially provided, and the parent refuses (or otherwise withholds) consent, State procedures, such as obtaining a court order authorizing the public agency to conduct the evaluation or provide the education and related services, must be followed.

If, however, there is no legal requirement for consent outside of these regulations, the public agency may use the due process procedures of §§ 300.506-300.508 to obtain a decision to allow the evaluation or services without parental consent. The agency must notify the parent of its actions, and the parent has appeal rights as well as rights at the hearing itself.

Note 3: If a State adopts a consent requirement in addition to those described in paragraph (b) of this section and consent is refused, paragraph (d) of this section requires that the public agency must nevertheless provide the services and activities that are not in dispute. For example, if a State requires parental consent to the provision of all services identified in an IEP and the parent refuses to consent to physical therapy services included in the IEP, the agency is not relieved of its obligation to implement those portions of the IEP to which the parent consents.

If a parent refuses to consent and the public agency determines that the service or activity in dispute is necessary to provide FAPE to the child, paragraph (c) of this section requires that the agency must implement its procedures to override the refusal. This section does not preclude the agency from reconsidering its proposal if it believes that circumstances warrant.

§ 300.505 Content of notice.

(a) The notice under § 300.504 must include—

(1) A full explanation of all of the procedural safeguards available to the parents under § 300.500, §§ 300.502-300.515, and §§ 300.562-300.569.

(2) A description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected;

(3) A description of each evaluation procedure, test, record, or report the agency uses as a basis for the proposal or refusal; and

(4) A description of any other factors that are relevant to the agency's proposal or refusal.

(b) The notice must be—

(1) Written in language understandable to the general public; and

(2) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(c) If the native language or other mode of communication of the parent is not a written language, the SEA or LEA shall take steps to ensure—

(1) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;

(2) That the parent understands the content of the notice; and

(3) That there is written evidence that the requirements in paragraphs (c)(1) and (2) of this section have been met.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1415(b)(1)(D))

§ 300.506 Impartial due process hearing.

(a) A parent or a public educational agency may initiate a hearing on any of the matters described in § 300.504 (a)(1) and (2).

(b) The hearing must be conducted by the SEA or the public agency directly responsible for the education of the child, as determined under State statute, State regulation, or a written policy of the SEA.

(c) The public agency shall inform the parent of any free or low-cost legal and other relevant services available in the area if—

(1) The parent requests the information; or

(2) The parent or the agency initiates a hearing under this section.

(Authority: 20 U.S.C. § 1415(b)(2))

Note: Many States have pointed to the success of using mediation as an intervening step prior to conducting a formal due process hearing. Although the process of mediation is not required by the statute or these regulations, an agency may wish to suggest mediation in disputes concerning the identification, evaluation, and educational placement of children with disabilities, and the provision of FAPE to those children. Mediations have been conducted by members of SEAs or LEA personnel who were not previously involved in the particular case. In many cases, mediation leads to resolution of differences between parents and agencies without the development of an adversarial relationship and with minimal emotional stress. However, mediation may not be used to deny or delay a parent's rights under §§ 300.500-300.515.

§ 300.507 Impartial hearing officer.

(a) A hearing may not be conducted—

(1) By a person who is an employee of a public agency that is involved in the education or care of the child; or

(2) By any person having a personal or professional interest that would conflict with his or her objectivity in the hearing.

(b) A person who otherwise qualifies to conduct a hearing under paragraph (a) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.

(c) Each public agency shall keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.

(Authority: 20 U.S.C. § 1414(b)(2))

§ 300.508 Hearing rights.

(a) Any party to a hearing has the right to:

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities.

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses.

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five days before the hearing.

(4) Obtain a written or electronic verbatim record of the hearing.

(5) Obtain written findings of fact and decisions. The public agency, after deleting any personally identifiable information, shall—

(i) Transmit those findings and decisions to the State advisory panel established under § 300.650; and

(ii) Make those findings and decisions available to the public.

(b) Parents involved in hearings must be given the right to—

(1) Have the child who is the subject of the hearing present; and

(2) Open the hearing to the public.

(Authority: 20 U.S.C. § 1415(d))

§ 300.509 Hearing decision; appeal.

A decision made in a hearing conducted under § 300.506 is final, unless a party to the hearing appeals the decision under § 300.510 or § 300.511.

(Authority: 20 U.S.C. § 1415(c))

§ 300.510 Administrative appeal; impartial review.

(a) If the hearing is conducted by a public agency other than the SEA, any party aggrieved by the findings and decision in the hearing may appeal to the SEA.

(b) If there is an appeal, the SEA shall conduct an impartial review of the hearing. The official conducting the review shall:

(1) Examine the entire hearing record.

(2) Ensure that the procedures at the hearing were consistent with the requirements of due process.

(3) Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in § 300.508 apply.

(4) Afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official.

(5) Make an independent decision on completion of the review.

(6) Give a copy of written findings and the decision to the parties.

(c) The SEA, after deleting any personally identifiable information, shall—

(1) Transmit the findings and decisions referred to in paragraph (b)(6) of this section to the State advisory panel established under § 300.650; and

(2) Make those findings and decisions available to the public.

(d) The decision made by the reviewing official is final unless a party brings a civil action under §300.511.

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(Authority: 20 U.S.C. § 1415(c), (d); H.R. Rep. No. 94-664, at p. 49 (1975))

Note 1: The SEA may conduct its review either directly or through another State agency acting on its behalf. However, the SEA remains responsible for the final decision on review.

Note 2: All parties have the right to continue to be represented by counsel at the State administrative review level, whether or not the reviewing official determines that a further hearing is necessary. If the reviewing official decides to hold a hearing to receive additional evidence, the other rights in § 300.508 relating to hearings also apply.

§ 300.511 Civil action.

Any party aggrieved by the findings and decision made in a hearing who does not have the right to appeal under § 300.510, and any party aggrieved by the decision of a reviewing officer under § 300.510 has the right to bring a civil action under section 615(e)(2) of the Act.

(Authority: 20 U.S.C. § 1415)

§ 300.512 Timeliness and convenience of hearings and reviews.

(a) The public agency shall ensure that not later than 45 days after the receipt of a request for a hearing—

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The SEA shall ensure that not later than 30 days after the receipt of a request for a review—

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.

(d) Each hearing and each review involving oral arguments must be conducted at a time and place that is reasonably convenient to the parents and child involved.

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(Authority: 20 U.S.C. § 1415)

§ 300.513 Child's status during proceedings.

(a) During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school program until the completion of all the proceedings.

(Authority: 20 U.S.C. § 1415(e)(3))

Note: Section 300.513 does not permit a child's placement to be changed during a complaint proceeding, unless the parents and agency agree otherwise. While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others.

§ 300.514 Surrogate parents.

(a) *General.* Each public agency shall ensure that the rights of a child are protected when—

(1) No parent (as defined in § 300.13) can be identified;

(2) The public agency, after reasonable efforts, cannot discover the whereabouts of a parent; or

(3) The child is a ward of the State under the laws of that State.

(b) *Duty of public agency.* The duty of a public agency under paragraph (a) of this section includes the assignment of an individual to act as a surrogate for the parents. This must include a method: (1) For determining whether a child needs a surrogate parent, and (2) for assigning a surrogate parent to the child.

(c) *Criteria for selection of surrogates.*

1) The public agency may select a surrogate parent in any way permitted under State law.

(2) Public agencies shall ensure that a person selected as a surrogate—

(i) Has no interest that conflicts with the interest of the child he or she represents; and

(ii) Has knowledge and skills that ensure adequate representation of the child.

(d) *Non-employee requirement; compensation.* (1) A person assigned as a surrogate may not be an employee of a public agency that is involved in the education or care of the child.

(2) A person who otherwise qualifies to be a surrogate parent under paragraphs (c) and (d)(1) of this section, is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent.

(e) *Responsibilities.* The surrogate parent may represent the child in all matters relating to—

(1) The identification, evaluation, and educational placement of the child; and

(2) The provision of FAPE to the child.

(Authority: 20 U.S.C. § 1415(b)(1)(B))

§ 300.515 Attorneys' fees.

Each public agency shall inform parents that in any action or proceeding under section 615 of the Act, courts may award parents reasonable attorneys' fees under the circumstances described in section 615(e)(4) of the Act.

(Authority: 20 U.S.C. §§ 1415(b)(1)(D); 1415(e)(4))

Protection in Evaluation Procedures

§ 300.530 General.

(a) Each SEA shall ensure that each public agency establishes and implements procedures that meet the requirements of §§ 300.530-300.534.

(b) Testing and evaluation materials and procedures used for the purposes of evaluation and placement of children with disabilities must be selected and administered so as not to be racially or culturally discriminatory.

(Authority: 20 U.S.C. § 1412(5)(C))

§ 300.531 Preplacement evaluation.

Before any action is taken with respect to the initial placement of a child with a disability in a program providing special education and related services, a full and individual evaluation of the child's educational needs must be conducted in accordance with the requirements of § 300.532.

(Authority: 20 U.S.C. § 1412(5)(C))

§ 300.532 Evaluation procedures.

State educational agencies and LEAs shall ensure, at a minimum, that:

(a) Tests and other evaluation materials—

(1) Are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so;

(2) Have been validated for the specific purpose for which they are used; and

(3) Are administered by trained personnel in conformance with the instructions provided by their producer.

(b) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(c) Tests are selected and administered so as best to ensure that when a test is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

(d) No single procedure is used as the sole criterion for determining an appropriate educational program for a child.

(e) The evaluation is made by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of suspected disability.

(f) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

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(Authority: 20 U.S.C. § 1412(5)(C))

Note: Children who have a speech or language impairment as their primary disability may not need a complete battery of assessments (e.g., psychological, physical, or adaptive behavior). However, a qualified speech-language pathologist would: (1) Evaluate each child with a speech or language impairment using procedures that are appropriate for the diagnosis and appraisal of speech and language impairments, and (2) if necessary, make referrals for additional assessments needed to make an appropriate placement decision.

§ 300.533 Placement procedures.

(a) In interpreting evaluation data and in making placement decisions, each public agency shall—

(1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior;

(2) Ensure that information obtained from all of these sources is documented and carefully considered;

(3) Ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(4) Ensure that the placement decision is made in conformity with the LRE rules in §§ 300.550-300.554.

(b) If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child in accordance with §§ 300.340-300.350.

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(Authority: 20 U.S.C. §§ 1412(5)(C); 1414(a)(5))

Note: Paragraph (a)(1) of this section includes a list of examples of sources that may be used by a public agency in making placement decisions. The agency would not have to use all the sources in every instance. The point of the requirement is to ensure that more than one source is used in interpreting evaluation data and in making placement decisions. For example, while all of the named sources would have to be used for a child whose suspected disability is mental retardation, they would not be necessary for certain other children with disabilities, such as a child who has a severe articulation impairment as his primary disability. For such a child, the speech-language pathologist, in complying with the multiple source requirement, might use: (1) A standardized test of articulation, and (2) observation of the child's articulation behavior in conversational speech.

§ 300.534 Reevaluation.

Each SEA and LEA shall ensure—

(a) That the IEP of each child with a disability is reviewed in accordance with §§ 300.340-300.350; and

(b) That an evaluation of the child, based on procedures that meet the requirements of § 300.532, is conducted every three years, or more frequently if conditions warrant, or if the child's parent or teacher requests an evaluation.

(Authority: 20 U.S.C. § 1412(5)(C))

Additional Procedures for Evaluating Children With Specific Learning Disabilities

§ 300.540 Additional team members.

In evaluating a child suspected of having a specific learning disability, in addition to the requirements of § 300.532, each public agency shall include on the multidisciplinary evaluation team—

(a)(1) The child's regular teacher; or

(2) If the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age; or

(3) For a child of less than school age, an individual qualified by the SEA to teach a child of his or her age; and

(b) At least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher.

(Authority: 20 U.S.C. § 1411 note)

§ 300.541 Criteria for determining the existence of a specific learning disability.

(a) A team may determine that a child has a specific learning disability if—

(1) The child does not achieve commensurate with his or her age and ability levels in one or more of the areas listed in paragraph (a)(2) of this section, when provided with learning experiences appropriate for the child's age and ability levels; and

(2) The team finds that a child has a severe discrepancy between achievement and intellectual ability in one or more of the following areas—

(i) Oral expression;

(ii) Listening comprehension;

(iii) Written expression;

(iv) Basic reading skill;

(v) Reading comprehension;

(vi) Mathematics calculation; or

(vii) Mathematics reasoning.

(b) The team may not identify a child as having a specific learning disability if the severe discrepancy between ability and achievement is primarily the result of—

(1) A visual, hearing, or motor impairment;

(2) Mental retardation;

(3) Emotional disturbance; or

(4) Environmental, cultural or economic disadvantage.

(Authority: 20 U.S.C. § 1411 note)

§ 300.542 Observation.

(a) At least one team member other than the child's regular teacher shall observe the child's academic performance in the regular classroom setting.

(b) In the case of a child of less than school age or out of school, a team member shall observe the child in an environment appropriate for a child of that age.

(Authority: 20 U.S.C. § 1411 note)

§ 300.543 Written report.

(a) The team shall prepare a written report of the results of the evaluation.

(b) The report must include a statement of—

(1) Whether the child has a specific learning disability;

(2) The basis for making the determination;

(3) The relevant behavior noted during the observation of the child;

(4) The relationship of that behavior to the child's academic functioning;

(5) The educationally relevant medical findings, if any;

(6) Whether there is a severe discrepancy between achievement and ability that is not correctable without special education and related services; and

(7) The determination of the team concerning the effects of environmental, cultural, or economic disadvantage.

(c) Each team member shall certify in writing whether the report reflects his or her conclusion. If it does not reflect his or her conclusion, the team member must submit a separate statement presenting his or her conclusions.

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(Authority: 20 U.S.C. § 1411 note)

Least Restrictive Environment

§ 300.550 General.

(a) Each SEA shall ensure that each public agency establishes and implements procedures that meet the requirements of §§ 300.550-300.556.

(b) Each public agency shall ensure—

(1) That to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

(2) That special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(Authority: 20 U.S.C. §§ 1412(5)(B); 1414(a)(1)(C)(iv))

§ 300.551 Continuum of alternative placements.

(a) Each public agency shall ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

(b) The continuum required in paragraph (a) of this section must

(1) Include the alternative placements listed in the definition of special education under § 300.17 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

(Authority: 20 U.S.C. § 1412(5)(B))

§ 300.552 Placements.

Each public agency shall ensure that

(a) The educational placement of each child with a disability

(1) Is determined at least annually;

(2) Is based on his or her IEP; and

(3) Is as close as possible to the child's home.

(b) The various alternative placements included at § 300.551 are available to the extent necessary to implement the IEP for each child with a disability.

(c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.

(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs.

(Authority: 20 U.S.C. § 1412(5)(B))

Note: Section 300.552 includes some of the main factors that must be considered in determining the extent to which a child with a disability can be educated with children who are nondisabled. The overriding rule in this section is that placement decisions must be made on an individual basis. The section also requires each agency to have various alternative placements available in order to ensure that each child with a disability receives an education that is appropriate to his or her individual needs.

The requirements of § 300.552, as well as the other requirements of §§ 300.550-300.556, apply to all preschool children with disabilities who are entitled to receive FAPE. Public agencies that provide preschool programs for nondisabled preschool children must ensure that the requirements of §300.552(c) are met. Public agencies that do not operate programs for nondisabled preschool children are not required to initiate such programs solely to satisfy the requirements regarding placement in the LRE embodied in §§ 300.550-300.556. For these public agencies, some alternative methods for meeting the requirements of §§ 300.550-300.556 include

(1) Providing opportunities for the participation (even part-time) of preschool children with disabilities in other preschool programs operated by public agencies (such as Head Start);

(2) Placing children with disabilities in private school programs for nondisabled preschool children or private school preschool programs that integrate children with disabilities and nondisabled children; and

(3) Locating classes for preschool children with disabilities in regular elementary schools.

In each case the public agency must ensure that each child's placement is in the LRE in which the unique needs of that child can be met based upon the child's IEP, and meets all of the other requirements of §§ 300.340-300.350 and §§ 300.550-300.556.

The analysis of the regulations for Section 504 of the Rehabilitation Act of 1973 (34 CFR part 104 Appendix, Paragraph 24) includes several points regarding educational placements of children with disabilities that are pertinent to this section:

1. With respect to determining proper placements, the analysis states: "* * * it should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs * * *."

2. With respect to placing a child with a disability in an alternate setting, the analysis states that among the factors to be considered in placing a child is the need to place the child as close to home as possible. Recipients are required to take this factor into account in making placement decisions. The parents' right to challenge the placement of their child extends not only to placement in special classes or separate schools, but also to placement in a distant school, particularly in a residential program. An equally appropriate education program may exist closer to home; and this issue may be raised by the parent under the due process provisions of this subpart.

§ 300.553 Nonacademic settings.

In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 300.306, each public agency shall ensure that each child with a disability participates with nondisabled children in those services and activities to the maximum extent appropriate to the needs of that child.

(Authority: 20 U.S.C. § 1412(5)(B))

Note: Section 300.553 is taken from a requirement in the final regulations for Section 504 of the Rehabilitation Act of 1973. With respect to this requirement, the analysis of the Section 504 Regulations includes the following statement: "[This paragraph] specifies that handicapped children must also be provided nonacademic services in as integrated a setting as possible. This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. To the maximum extent appropriate, children in residential settings are also to be provided opportunities for participation with other children." (34 CFR part 104—Appendix, Paragraph 24.)

§ 300.554 Children in public or private institutions

Each SEA shall make arrangements with public and private institutions (such as a memorandum of agreement or special implementation procedures) as may be necessary to ensure that § 300.550 is effectively implemented.

(Authority: 20 U.S.C. § 1412(5)(B))

Note: Under section 612(5)(B) of the statute, the requirement to educate children with disabilities with nondisabled children also applies to children in public and private institutions or other care facilities. Each SEA must ensure that each applicable agency and institution in the State implements this requirement. Regardless of other reasons for institutional placement, no child in an institution who is capable of education in a regular public school setting may be denied access to an education in that setting.

§ 300.555 Technical assistance and training activities.

Each SEA shall carry out activities to ensure that teachers and administrators in all public agencies—

(a) Are fully informed about their responsibilities for implementing § 300.550; and

(b) Are provided with technical assistance and training necessary to assist them in this effort.

(Authority: 20 U.S.C. § 1412(5)(B)

§ 300.556 Monitoring activities.

(a) The SEA shall carry out activities to ensure that § 300.550 is implemented by each public agency.

(b) If there is evidence that a public agency makes placements that are inconsistent with §300.550, the SEA shall—

(1) Review the public agency's justification for its actions; and

(2) Assist in planning and implementing any necessary corrective action.

(Authority: 20 U.S.C. § 1412(5)(B))

Confidentiality of Information

§ 300.560 Definitions.

As used in §§ 300.560-300.576—

Destruction means physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable.

Education records means the type of records covered under the definition of education records in part 99 of this title (the regulations implementing the Family Educational Rights and Privacy Act of 1974).

Participating agency means any agency or institution that collects, maintains, or uses personally identifiable information, or from which information is obtained, under this part.

(Authority: 20 U.S.C. §§ 1412(2)(D);
1417(c))

§ 300.561 Notice to parents.

(a) The SEA shall give notice that is adequate to fully inform parents about the requirements of § 300.128, including:

(1) A description of the extent that the notice is given in the native languages of the various population groups in the State;

(2) A description of the children on whom personally identifiable information is maintained, the types of information sought, the methods the State intends to use in gathering the information (including the sources from whom information is gathered), and the uses to be made of the information;

(3) A summary of the policies and procedures that participating agencies must follow regarding storage, disclosure to third parties, retention, and destruction of personally identifiable information; and

(4) A description of all of the rights of parents and children regarding this information, including the rights under the Family Educational Rights and Privacy Act of 1974 and implementing regulations in part 99 of this title.

(b) Before any major identification, location, or evaluation activity, the notice must be published or announced in newspapers or other media, or both, with circulation adequate to notify parents throughout the State of the activity.

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(Authority: 20 U.S.C. §§ 1412(2)(D); 1417(c))

§ 300.562 Access rights.

(a) Each participating agency shall permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency shall comply with a request without unnecessary delay and before any meeting regarding an IEP or any hearing relating to the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child, and in no case more than 45 days after the request has been made.

(b) The right to inspect and review education records under this section includes

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.

(c) An agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.

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(Authority: 20 U.S.C. §§ 1412 (2)(D); 1417(c))

§ 300.563 Record of access.

Each participating agency shall keep a record of parties obtaining access to education records collected, maintained, or used under this part (except access by parents and authorized employees of the participating agency), including the name of the party, the date access was given, and the purpose for which the party is authorized to use the records.

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(Authority: 20 U.S.C. §§ 1412(2)(D); 1417(c))

§ 300.564 Records on more than one child.

If any education record includes information on more than one child, the parents of those children shall have the right to inspect and review only the information relating to their child or to be informed of that specific information.

(Authority: 20 U.S.C. §§ 1412(2)(D); 1417(c))

§ 300.565 List of types and locations of information.

Each participating agency shall provide parents on request a list of the types and locations of education records collected, maintained, or used by the agency.

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(Authority: 20 U.S.C. §§ 1412(2)(D); 1417(c))

§ 300.566 Fees.

(a) Each participating agency may charge a fee for copies of records that are made for parents under this part if the fee does not effectively prevent the parents from exercising their right to inspect and review those records.

(b) A participating agency may not charge a fee to search for or to retrieve information under this part.

(Authority: 20 U.S.C. §§ 1412(2)(D); 1417(c))

§ 300.567 Amendment of records at parent's request.

(a) A parent who believes that information in the education records collected, maintained, or used under this part is inaccurate or misleading or violates the privacy or other rights of the child may request the participating agency that maintains the information to amend the information.

(b) The agency shall decide whether to amend the information in accordance with the request within a reasonable period of time of receipt of the request.

(c) If the agency decides to refuse to amend the information in accordance with the request, it shall inform the parent of the refusal, and advise the parent of the right to a hearing under § 300.568.

(Authority: 20 U.S.C. §§ 1412(2)(D); 1417(c))

§ 300.568 Opportunity for a hearing.

The agency shall, on request, provide an opportunity for a hearing to challenge information in education records to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child.

(Authority: 20 U.S.C. §§ 1412(2)(D); 1417(c))

§ 300.569 Result of hearing.

(a) If, as a result of the hearing, the agency decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of the child, it shall amend the information accordingly and so inform the parent in writing.

(b) If, as a result of the hearing, the agency decides that the information is not inaccurate, misleading or otherwise in violation of the privacy or other rights of the child, it shall inform the parent of the right to place in the records it maintains on the child a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the agency.

(c) Any explanation placed in the records of the child under this section must:

(1) Be maintained by the agency as part of the records of the child as long as the record or contested portion is maintained by the agency; and

(2) If the records of the child or the contested portion is disclosed by the agency to any party, the explanation must also be disclosed to the party.

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(Authority: 20 U.S.C. §§ 1412(2)(D); 1417(c))

§ 300.570 Hearing procedures.

(1) A hearing held under § 300.568 must be conducted according to the procedures under § 99.22 of this title.

(Authority: 20 U.S.C. §§ 1412(2)(D); 1417(c))

§ 300.571 Consent.

(a) Parental consent must be obtained before personally identifiable information is:

(1) Disclosed to anyone other than officials of participating agencies collecting or using the information under this part, subject to paragraph (b) of this section; or

(2) Used for any purpose other than meeting a requirement of this part.

(b) An educational agency or institution subject to part 99 of this title may not release information from education records to participating agencies without parental consent unless authorized to do so under part 99 of this title.

(c) The SEA shall include policies and procedures in its State plan that are used in the event that a parent refuses to provide consent under this section.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. §§ 1412(2)(D); 1417(c))

§ 300.572 Safeguards.

(a) Each participating agency shall protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.

(b) One official at each participating agency shall assume responsibility for ensuring the confidentiality of any personally identifiable information.

(c) All persons collecting or using personally identifiable information must receive training or instruction regarding the State's policies and procedures under § 300.129 and part 99 of this title.

(d) Each participating agency shall maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. §§ 1412(2)(D); 1417(c))

§ 300.573 Destruction of information.

(a) The public agency shall inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the child.

(b) The information must be destroyed at the request of the parent. However, a permanent record of a student's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.

(Authority: 20 U.S.C. §§ 1412(2)(D); 1417(c))

Note: Under § 300.573, the personally identifiable information on a child with a disability may be retained permanently unless the parents request that it be destroyed. Destruction of records is the best protection against improper and unauthorized disclosure. However, the records may be needed for other purposes. In informing parents about their rights under this section, the agency should remind them that the *records may be needed by the child or the* parents for social security benefits or other purposes. If the parents request that the information be destroyed, the agency may retain the information in paragraph (b) of this section.

§ 300.574 Children's rights.

The SEA shall include policies and procedures in its State plan regarding the extent to which children are afforded rights of privacy similar to those afforded to parents, taking into consideration the age of the child and type or severity of disability.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. §§ 1412(2)(D); 1417(c))

Note: Under the regulations for the Family Education Rights and Privacy Act of 1974 (34 CFR 99.5(a)), the rights of parents regarding education records are transferred to the student at age 18.

§ 300.575 Enforcement.

The SEA shall describe in its State plan the policies and procedures, including sanctions, that the State uses to ensure that its policies and procedures are followed and that the requirements of the Act and the regulations in this part are met.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. §§ 1412(2)(D); 1417(c))

§ 300.576 Department.

If the Department or its authorized representatives collect any personally identifiable information regarding children with disabilities that is not subject to 5 U.S.C. 552a (The Privacy Act of 1974), the Secretary shall apply the requirements of 5 U.S.C. section 552a (b)(1)-(2), (4)-(11); (c); (d); (e)(1), (2), 3(A), (B), and (D), (5)-(10); (h); (m); and (n), and the regulations implementing those provisions in part 5b of this title.

(Authority: 20 U.S.C. §§ 1412(2)(D); 1417(c))

Department Procedures

§ 300.580 [Reserved]

§ 300.581 Disapproval of a State plan

Before disapproving a State plan, the Secretary gives the SEA written notice and an opportunity for a hearing.

(Authority: 20 U.S.C. § 1413(c))

§ 300.582 Content of notice.

(a) In the written notice the Secretary—

(1) States the basis on which the Secretary proposes to disapprove the State plan;

(2) May describe possible options for resolving the issues;

(3) Advises the SEA that it may request a hearing and that the request for a hearing must be made not later that 30 calendar days after it receives the notice of proposed disapproval; and

(4) Provides information about the procedures followed for a hearing.

(b) The Secretary sends the written notice to the SEA by certified mail with return receipt requested.

(Authority: 20 U.S.C. § 1413(c))

§ 300.583 Hearing official or panel.

(a) If the SEA requests a hearing, the Secretary designates one or more individuals, either from the Department or elsewhere, not responsible for or connected with the administration of this program, to conduct a hearing.

(b) If more than one individual is designated, the Secretary designates one of those individuals as the Chief Hearing Official of the Hearing Panel. If one individual is designated, that individual is the Hearing Official.

(Authority: 20 U.S.C. § 1413(c))

§ 300.584 Hearing procedures.

(a) As used in §§ 300.581-300.586 the term *party or parties* means the following:

(1) An SEA that requests a hearing regarding the proposed disapproval of its State plan under this part.

(2) The Department of Education official who administers the program of financial assistance under this part.

(3) A person, group or agency with an interest in and having relevant information about the case that has applied for and been granted leave to intervene by the Hearing Official or Panel.

(b) Within 15 calendar days after receiving a request for a hearing, the Secretary designates a Hearing Official or Panel and notifies the parties.

(c) The Hearing Official or Panel may

regulate the course of proceedings and the conduct of the parties during the proceedings. The Hearing Official or Panel takes all steps necessary to conduct a fair and impartial proceeding, to avoid delay, and to maintain order, including the following:

(1) The Hearing Official or Panel may hold conferences or other types of appropriate proceedings to clarify, simplify, or define the issues or to consider other matters that may aid in the disposition of the case.

(2) The Hearing Official or Panel may schedule a prehearing conference of the Hearing Official or Panel and parties.

(3) Any party may request the Hearing Official or Panel to schedule a prehearing or other conference. The Hearing Official or Panel decides whether a conference is necessary and notifies all parties.

(4) At a prehearing or other conference, the Hearing Official or Panel and the parties may consider subjects such as—

(i) Narrowing and clarifying issues;

(ii) Assisting the parties in reaching agreements and stipulations;

(iii) Clarifying the positions of the parties;

(iv) Determining whether an evidentiary hearing or oral argument should be held; and

(v) Setting dates for—

(A) The exchange of written documents;

(B) The receipt of comments from the parties on the need for oral argument or evidentiary hearing;

(C) Further proceedings before the Hearing Official or Panel (including an evidentiary hearing or oral argument, if either is scheduled);

(D) Requesting the names of witnesses each party wishes to present at an evidentiary hearing and estimation of time for each presentation; or

(E) Completion of the review and the initial decision of the Hearing Official or Panel.

(5) A prehearing or other conference held under paragraph (b)(4) of this section may be conducted by telephone conference call.

(6) At a prehearing or other conference, the parties shall be prepared to discuss the subjects listed in paragraph (b)(4) of this section.

(7) Following a prehearing or other conference the Hearing Official or Panel may issue a written statement describing the issues raised, the action taken, and the stipulations and agreements reached by the parties.

(d) The Hearing Official or Panel may require parties to state their positions and to provide all or part of the evidence in writing.

(e) The Hearing Official or Panel may require parties to present testimony through affidavits and to conduct cross-examination through interrogatories.

(f) The Hearing Official or Panel may direct the parties to exchange relevant documents or information and lists of witnesses, and to send copies to the Hearing Official or Panel.

(g) The Hearing Official or Panel may receive, rule on, exclude, or limit evidence at any stage of the proceedings.

(h) The Hearing Official or Panel may rule on motions and other issues at any stage of the proceedings.

(i) The Hearing Official or Panel may examine witnesses.

(j) The Hearing Official or Panel may set reasonable time limits for submission of written documents.

(k) The Hearing Official or Panel may refuse to consider documents or other submissions if they are not submitted in a timely manner unless good cause is shown.

(l) The Hearing Official or Panel may interpret applicable statutes and regulations but may not waive them or rule on their validity.

(m) (1) The parties shall present their positions through briefs and the submission of other documents and may request an oral argument or evidentiary hearing. The Hearing Official or Panel shall determine whether an oral argument or an evidentiary hearing is needed to clarify the positions of the parties.

(2) The Hearing Official or Panel gives each party an opportunity to be represented by counsel.

(n) If the Hearing Official or Panel determines that an evidentiary hearing would materially assist the resolution of the matter, the Hearing Official or Panel gives each party, in addition to the opportunity to be represented by counsel—

(1) An opportunity to present witnesses on the party's behalf; and

(2) An opportunity to cross-examine witnesses either orally or with written questions.

(o) The Hearing Official or Panel accepts any evidence that it finds is relevant and material to the proceedings and is not unduly repetitious.

(p) (1) The Hearing Official or Panel—

(i) Arranges for the preparation of a transcript of each hearing;

(ii) Retains the original transcript as part of the record of the hearing; and

(iii) Provides one copy of the transcript to each party.

(2) Additional copies of the transcript are available on request and with payment of the reproduction fee.

(q) Each party shall file with the Hearing Official or Panel all written motions, briefs, and other documents and shall at the same time provide a copy to the other parties to the proceedings.

(Authority: 20 U.S.C. § 1413(c))

§ 300.585 Initial decision; final decision.

(a) The Hearing Official or Panel prepares an initial written decision that addresses each of the points in the notice sent by the Secretary to the SEA under § 300.582.

(b) The initial decision of a Panel is made by a majority of Panel members.

(c) The Hearing Official or Panel mails by certified mail with return receipt requested a copy of the initial decision to each party (or to the party's counsel) and to the Secretary, with a notice stating that each party has an opportunity to submit written comments regarding the decision to the Secre-tary.

(d) Each party may file comments and recommendations on the initial decision with the Hearing Official or Panel within 15 calendar days of the date the party receives the Panel's decision.

(e) The Hearing Official or Panel sends a copy of a party's initial comments and recommendations to the other parties by certified mail with return receipt requested. Each party may file responsive comments and recommendations with the Hearing Official or Panel within seven calendar days of the date the party receives the initial comments and recommendations.

(f) The Hearing Official or Panel forwards the parties' initial and responsive comments on the initial decision to the Secretary who reviews the initial decision and issues a final decision.

(g) The initial decision of the Hearing Official or Panel becomes the final decision of the Secretary unless, within 25 calendar days after the end of the time for receipt of written comments, the Secretary informs the Hearing Official or Panel and the parties to a hearing in writing that the decision is being further reviewed for possible modification.

(h) The Secretary may reject or modify the initial decision of the Hearing Official or Panel if the Secretary finds that it is clearly erroneous.

(i) The Secretary conducts the review based on the initial decision, the written record, the Hearing Official's or Panel's proceedings, and written comments. The Secretary may remand the matter for further proceedings.

(j) The Secretary issues the final decision within 30 calendar days after notifying the Hearing Official or Panel that the initial decision is being further reviewed.

§ 300.586 Filing requirements.

(a) Any written submission under §§ 300.582-300.585 must be filed by hand-delivery, by mail, or by facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(b) The filing date under paragraph (a) of this section is the date the document is

(1) Hand-delivered;

(2) Mailed; or

(3) Sent by facsimile transmission.

(c) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was received by the Department.

(d) If a document is filed by facsimile transmission, the Secretary, the Hearing Official, or the Panel, as applicable, may require the filing of a follow-up hard copy by hand-delivery or by mail within a reasonable period of time.

(e) If agreed upon by the parties, service of a document may be made upon the other party by facsimile transmission.

(Authority: 20 U.S.C. § 1413(c))

§ 300.587 Judicial review.

If a State is dissatisfied with the Secretary's final action with respect to its State plan, the State may, within 60 calendar days after notice of that action, file a petition for review with the United States court of appeals for the circuit in which the State is located.

(Authority: 20 U.S.C. § 1416(b)(1))

§ 300.588 [Reserved]

§ 300.589 Waiver of requirement regarding supplementing and supplanting with Part B funds.

(a) Under sections 613(a)(9)(B) and 614(a)(2)(B)(ii) of the Act, SEAs and LEAs must ensure that Federal funds provided under this part are used to supplement and increase the level of Federal, State, and local funds (including funds that are not under the direct control of SEAs or LEAs) expended for special education and related services provided to children with disabilities under this part and in no case to supplant those Federal, State, and local funds. The nonsupplanting requirement applies only to funds allocated to LEAs (See § 300.372).

(b) If the State provides clear and convincing evidence that all children with disabilities have FAPE available to them, the Secretary may waive in part the requirement under sections 613(a)(9)(B) and 614(a)(2)(B)(ii) of the Act if the Secretary concurs with the evidence provided by the State.

(c) If a State wishes to request a waiver, it must inform the Secretary in writing. The Secretary then provides the State with a finance and membership report form that provides the basis for the request.

(d) In its request for a waiver, the State shall include the results of a special study made by the State to obtain evidence of the availability of FAPE to all children with disabilities. The special study must include statements by a representative sample of organizations that deal with children with disabilities, and parents and teachers of children with disabilities, relating to the following areas—

(1) The adequacy and comprehensiveness of the State's system for identifying, locating, and evaluating children with disabilities;

(2) The cost to parents, if any, for education for children enrolled in public and private day schools, and in public and private residential schools and institutions; and

(3) The adequacy of the State's due process procedures.

(e) In its request for a waiver, the State shall include finance data relating to the availability of FAPE for all children with disabilities, including—

(1) The total current expenditures for regular education programs and special education programs by function and by source of funds (State, local, and Federal) for the previous school year; and

(2) The full-time equivalent membership of students enrolled in regular programs and in special programs in the previous school year.

(f) The Secretary considers the information that the State provides under paragraphs (d) and (e) of this section, along with any additional information he may request, or obtain through on-site reviews of the State's education programs and records, to determine that all children have FAPE available to them, and if so, the extent of the waiver.

(g) The State may request a hearing with regard to any final action by the Secretary under this section.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. §§ 1411(c)(3); 1413(a)(9)(B))

Subpart F—State Administration

General

§ 300.600 Responsibility for all educational programs.

(a) The SEA is responsible for ensuring—

(1) That the requirements of this part are carried out; and

(2) That each educational program for children with disabilities administered within the State, including each program administered by any other public agency—

(i) Is under the general supervision of the persons responsible for educational programs for children with disabilities in the SEA; and

(ii) Meets the education standards of the SEA (including the requirements of this part).

(b) The State must comply with paragraph (a) of this section through State statute, State regulation, signed agreement between respective agency officials, or other documents.

(c) This part may not be construed to limit the responsibility of agencies other than educational agencies for providing or paying some or all of the costs of FAPE to children with disabilities in the State.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1412(6))

Note: The requirement in § 300.600(a) is taken essentially verbatim from section 612(6) of the statute and reflects the desire of the Congress for a central point of responsibility and accountability in the education of children with disabilities within each State. With respect to SEA responsibility, the Senate Report on Pub. L. 94-142 includes the following statements:

> This provision is included specifically to assure a single line of responsibility with regard to the education of handicapped children, and to assure that in the implementation of all provisions of this Act and in carrying out the right to education for handicapped children, the State educational agency shall be the responsible agency * * *.
>
> Without this requirement, there is an abdication of responsibility for the education of handicapped children. Presently, in many States, responsibility is divided, depending upon the age of the handicapped child, sources of funding, and type of services delivered. While the Committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency. (S. Rep. No. 94-168, p. 24 (1975))

In meeting the requirements of this section, there are a number of acceptable options that may be adopted, including the following:

(1) Written agreements are developed between respective State agencies concerning SEA standards and monitoring. These agreements are binding on the local or regional counterparts of each State agency.

(2) The Governor's Office issues an administrative directive establishing the SEA responsibility.

(3) State law, regulation, or policy designates the SEA as responsible for establishing standards for all educational programs for individuals with disabilities, and includes responsibility for monitoring.

(4) State law mandates that the SEA is responsible for all educational programs.

§ 300.601 Relation of part B to other Federal programs.

This part may not be construed to permit a State to reduce medical and other assistance available to children with disabilities, or to alter the eligibility of a child with a disability, under title V (Maternal and Child Health) or title XIX (Medicaid) of the Social Security Act, to receive services that are also part of FAPE.

(Authority: 20 U.S.C. § 1413(e))

Use of Funds

§ 300.620 Federal funds for State administration.

A State may use five percent of the total State allotment in any fiscal year under part B of the Act, or $450,000, whichever is greater, for administrative costs related to carrying out sections 612 and 613 of the Act. However, this amount cannot be greater than twenty-five percent of the State's total allotment for the fiscal year under part B of the Act.

(Authority: 20 U.S.C. § 1411(b), (c))

§ 300.621 Allowable costs.

(a) The SEA may use funds under § 300.620 for—

(1) Administration of the State plan and for planning at the State level, including planning, or assisting in the planning, of programs or projects for the education of children with disabilities;

(2) Approval, supervision, monitoring, and evaluation of the effectiveness of local programs and projects for the education of children with disabilities;

(3) Technical assistance to LEAs with respect to the requirements of this part;

(4) Leadership services for the program supervision and management of special education activities for children with disabilities; and

(5) Other State leadership activities and consultative services.

(b) The SEA shall use the remainder of its funds under § 300.620 in accordance with § 300.370.

(Authority: 20 U.S.C. § 1411(b), (c))

State Advisory Panel

§ 300.650 Establishment.

(a) Each State shall establish, in accordance with the provisions of §§ 300.650-300.653, a State advisory panel on the education of children with disabilities.

(b) The advisory panel must be appointed by the Governor or any other official authorized under State law to make those appointments.

(c) If a State has an existing advisory panel that can perform the functions in § 300.652, the State may modify the existing panel so that it fulfills all of the requirements of §§ 300.650-300.653, instead of establishing a new advisory panel.

(Authority: 20 U.S.C. § 1413 (a)(12))

§ 300.651 Membership.

(a) The membership of the State advisory panel must be composed of persons involved in or concerned with the education of children with disabilities. The membership must include at least one person representative of each of the following groups—

(1) Individuals with disabilities;

(2) Teachers of children with disabilities;

(3) Parents of children with disabilities;

(4) State and local educational officials; and

(5) Special education program administrators.

(b) The State may expand the advisory panel to include additional persons in the groups listed in paragraph (a) of this section and representatives of other groups not listed.

(Authority: 20 U.S.C. § 1413(a)(12))

Note: The membership of the State advisory panel, as listed in paragraphs (a)(1)-(5) of this section, is required in section 613(a)(12) of the Act. As indicated in paragraph (b) of this section, the composition of the panel and the number of members may be expanded at the discretion of the State. In adding to the membership, consideration could be given to having—

(1) An appropriate balance between professional groups and consumers (i.e., parents, advocates, and individuals with disabilities);

(2) Broad representation within the consumer-advocate groups, to ensure that the interests and points of view of various parents, advocates and individuals with disabilities are appropriately represented;

(3) Broad representation within professional groups (e.g., regular education personnel; special educators, including teachers, teacher trainers, and administrators, who can properly represent various dimensions in the education of children with disabilities; and appropriate related services personnel); and

(4) Representatives from other State advisory panels (such as vocational education).

If a State elects to maintain a small advisory panel (e.g., 10-15 members), the panel itself could take steps to ensure that it (1) consults with and receives inputs from various consumer and special interest professional groups, and (2) establishes committees for particular short-term purposes composed of representatives from those input groups.

§ 300.652 Advisory panel functions.

The State advisory panel shall—

(a) Advise the SEA of unmet needs within the State in the education of children with disabilities;

(b) Comment publicly on the State plan and rules or regulations proposed for issuance by the State regarding the education of children with disabilities and the procedures for distribution of funds under this part; and

(c) Assist the State in developing and reporting such information and evaluations as may assist the Secretary in the performance of his responsibilities under section 618 of the Act.

(Authority: 20 U.S.C. § 1413(a)(12))

§ 300.653 Advisory panel procedures.

(a) The advisory panel shall meet as often as necessary to conduct its business.

(b) By July 1 of each year, the advisory panel shall submit an annual report of panel activities and suggestions to the SEA. This report must be made available to the public in a manner consistent with other public reporting requirements of this part.

(c) Official minutes must be kept on all panel meetings and shall be made available to the public on request.

(d) All advisory panel meetings and agenda items must be publicly announced prior to the meeting, and meetings must be open to the public.

(e) Interpreters and other necessary services must be provided at panel meetings for panel members or participants. The State may pay for these services from funds under § 300.620.

(f) The advisory panel shall serve without compensation but the State must reimburse the panel for reasonable and necessary expenses for attending meetings and performing duties. The State may use funds under § 300.620 for this purpose.

Approved by the Office of Management and Budget under control number 1820-0030.

(Authority: 20 U.S.C. § 1413(a)(12))

State Complaint Procedures

§ 300.660 Adoption of State complaint procedures.

Each SEA shall adopt written procedures for:

(a) Resolving any complaint that meets the requirements of § 300.662 by—

(1) Providing for the filing of a complaint with the SEA; and

(2) At the SEA's discretion, providing for the filing of a complaint with a public agency and the right to have the SEA review the public agency's decision on the complaint.

(b) Informing parents and other interested individuals about the procedures in §§ 300.660-300.662.

Approved by the Office of Management and Budget under control number 1820-0599.

(Authority: 20 U.S.C. § 2831(a))

§ 300.661 Minimum State complaint procedures.

Each SEA shall include the following in its complaint procedures:

(a) A time limit of 60 calendar days after a complaint is filed under § 300.660(a) to—

(1) Carry out an independent on-site investigation, if the SEA determines that such an investigation is necessary;

(2) Give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint;

(3) Review all relevant information and make an independent determination as to whether the public agency is violating a requirement of part B of the Act or of this part; and

(4) Issue a written decision to the complainant that addresses each allegation in the complaint and contains—

(i) Findings of fact and conclusions; and

(ii) The reasons for the SEA's final decision.

(b) An extension of the time limit under paragraph (a) of this section only if exceptional circumstances exist with respect to a particular complaint.

(c) Procedures for effective implementation of the SEA's final decision, if needed, including technical assistance activities, negotiations, and corrective actions to achieve compliance.

(d) The right of the complainant or the public agency to request the Secretary to review the SEA's final decision.

Approved by the Office of Management and Budget under control number 1820-0599.

(Authority: 20 U.S.C. § 2831(a))

§ 300.662 Filing a complaint.

An organization or individual may file a signed written complaint under the procedures described in §§ 300.600-300.661. The complaint must include—

(a) A statement that a public agency has violated a requirement of part B of the Act or of this part; and

(b) The facts on which the statement is based.

Approved by the Office of Management and Budget under control number 1820-0599.

(Authority: 20 U.S.C. § 2831(a))

Subpart G—Allocation of Funds; Reports

Allocations

§ 300.700 Special definition of the term State.

For the purposes of § 300.701, § 300.702, and §§ 300.704-300.708, the term "State" does not include Guam, American Samoa, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia, the Republic of the Marshall Islands, or Palau.

(Authority: U.S.C. § 1411(a)(2))

§ 300.701 State entitlement; formula.

(a) The Secretary calculates the maximum amount of the grant to which a State is entitled under section 611 of the Act in any fiscal year as follows:

(1) If the State is eligible for a grant under section 619 of the Act, the maximum entitlement is equal to the number of children with disabilities aged 3 through 21 in the State who are receiving special education and related services, multiplied by 40 percent of the average per pupil expenditure in public elementary and secondary schools in the United States.

(2) If the State is not eligible for a grant under section 619 of the Act, the maximum entitlement is equal to the number of children with disabilities aged 6 through 21 in the State who are receiving special education and related services, multiplied by 40 percent of the average per pupil expenditure in public elementary and secondary schools in the United States.

(Authority: 20 U.S.C. § 1411(a)(1))

(b) [Reserved]

(c) For the purposes of this section, the *average per pupil expenditure in public elementary and secondary schools in the United States*, means the aggregate expenditures during the second fiscal year preceding the fiscal year for which the computation is made (or if satisfactory data for that year are not available at the time of computation, then during the most recent preceding fiscal year for which satisfactory data are available) of all LEAs in the United States (which, for the purpose of this section, means the 50 States and the District of Columbia), plus any direct expenditures by the State for operation of those agencies (without regard to the source of funds from which either of those expenditures are made), divided by the aggregate number of children in average daily attendance to whom those agencies provided free public education during that preceding year.

(Authority: 20 U.S.C. § 1411(a)(4))

§ 300.702 Limitations and exclusions.

(a) In determining the amount of a grant under § 300.701:

(1) If a State serves all children with disabilities aged 3 through 5 in the State, the Secretary does not count children with disabilities aged 3 through 17 in the State to the extent that the number of those children is greater than 12 percent of the number of all children aged 3 through 17 in the State.

(2) If a State does not serve all children with disabilities aged 3 through 5 in the State, the Secretary does not count children with disabilities aged 5 through 17 to the extent that the number of those children is greater than 12 percent of the number of all children aged 5 through 17 in the State.

(3) The Secretary does not count children with disabilities who are counted under subpart 2 of part D of chapter 1 of title 1 of the Elementary and Secondary Education Act of 1965.

(b) For the purposes of paragraph (a) of this section, the number of children aged 3 through 17 and 5 through 17 in any State is determined by the Secretary on the basis of the most recent satisfactory data available.

(Authority: 20 U.S.C. § 1411(a)(5))

§ 300.703 Ratable reductions.

(a) *General.* If the sums appropriated for any fiscal year for making payments to States under section 611 of the Act are not sufficient to pay in full the total amounts that all States are entitled to receive for that fiscal year, the maximum amount that all States are entitled to receive for that fiscal year shall be ratably reduced. In case additional funds become available for making payments for any fiscal year during which the preceding sentence is applicable, those reduced amounts shall be increased on the same basis they were reduced.

(Authority: 20 U.S.C. § 1411(g)(1))

(b) *Reporting dates for Local educational agencies and reallocations.* (1) In any fiscal year that the State entitlement has been ratably reduced, and that additional funds have not been made available to pay in full the total of the amounts under paragraph (a) of this section, the SEA shall fix dates before which each LEA shall report to the State the amount of funds available to it under this part that it estimates it will expend.

(2) The amounts available under paragraph (a) of this section, or any amount that would be available to any other LEA if it were to submit an application meeting the requirements of this part, that the SEA determines will not be used for the period of its availability shall be available for allocation to those LEAs, in the manner provided in § 300.707, that the SEA determines will need and be able to use additional funds to carry out approved programs.

(Authority: 20 U.S.C. § 1411(g)(2))

§ 300.704 Hold harmless provision.

No State shall receive less than the amount it received under part B of the Act for fiscal year 1977.

(Authority: 20 U.S.C. § 1411(a)(1))

§ 300.705 Allocation for State in which by-pass is implemented for private school children with disabilities.

In determining the allocation under §§ 300.700-300.703 of a State in which the Secretary will implement a by-pass for private school children with disabilities under §§ 300.451-300.486, the Secretary includes in the State's child count—

(a) For the first year of a by-pass, the actual or estimated number of private school children with disabilities (as defined in §§ 300.7(a) and 300.450) in the State, as of the preceding December 1; and

(b) For succeeding years of a by-pass, the number of private school children with disabilities who received special education and related services under the by-pass in the preceding year.

(Authority: 20 U.S.C. §§ 1411(a)(1)(A); 1411(a)(3); 1413(d))

§ 300.706 Within-State distribution; fiscal year 1979 and after.

Of the funds received under § 300.701 by any State for fiscal year 1979, and for each fiscal year after fiscal year 1979—

(a) 25 percent may be used by the State in accordance with § 300.620 and § 300.370; and

(b) 75 percent shall be distributed to the LEAs in the State in accordance with § 300.707.

(Authority: 20 U.S.C. § 1411(c)(1))

§ 300.707 Local educational agency entitlement; formula.

From the total amount of funds available to all LEAs, each LEA is entitled to an amount that bears the same ratio to the total amount as the number of children with disabilities aged 3 through 21 in that agency who are receiving special education and related services bears to the aggregate number of children with disabilities aged 3 through 21 receiving special education and related services in all LEAs that apply to the SEA for funds under part B of the Act.

(Authority: 20 U.S.C. § 1411(d))

§ 300.708 Reallocation of local educational agency funds.

If an SEA determines that an LEA is adequately providing FAPE to all children with disabilities residing in the area served by the local agency with State and local funds otherwise available to the local agency, the SEA may reallocate funds (or portions of those funds that are not required to provide special education and related services) made available to the local agency under § 300.707, to other LEAs within the State that are not adequately providing special education and related services to all children with disabilities residing in the areas served by the other LEAs.

(Authority: 20 U.S.C. § 1414(e))

§ 300.709 Payments to the Secretary of the Interior for the education of Indian children.

(a) *General.* (1) The Secretary makes payments to the Secretary of the Interior to meet the need for assistance for the education of children with disabilities on reservations, aged 5 through 21, who are enrolled in elementary and secondary schools for Indian children operated or funded by the Secretary of the Interior.

(2) In the case of Indian students aged 3 through 5 who are enrolled in programs affiliated with Bureau of Indian Affairs (BIA) schools that are required by the States in which the schools are located to attain or maintain State accreditation and had State accreditation prior to October 7, 1991, the schools may count those children for the purpose of distribution of the funds provided under paragraph (a)(1) of this section to the Secretary of the Interior.

(3) The amount of the payment under paragraph (a)(1) of this section for any fiscal year is one percent of the aggregate amounts available to all States under this part for that fiscal year.

(b) *Responsibility for meeting the requirements of part B.* The Secretary of the Interior shall be responsible for meeting all of the requirements of part B of the Act for the children described in paragraph (a) of this section, in accordance with § 300.260.

(Authority: 20 U.S.C. § 1411(f))

§ 300.710 Payments to the Secretary of the Interior for Indian tribes or tribal organizations.

(a) *General.* (1) Beginning with funds appropriated under part B of the Act for fiscal year 1992, the Secretary, subject to this section, makes payments to the Secretary of the Interior to be distributed to tribes or tribal organizations (as defined under section 4 of the Indian Self-Determination and Education Assistance Act) or consortiums of those tribes or tribal organizations to provide for the coordination of assistance for special education and related services for children with disabilities, aged 3 through 5, on reservations served by elementary and secondary schools for Indian children operated or funded by the Department of the Interior.

(2) The amount of the payment under paragraph (b)(1) of this section for any fiscal year is .25 percent of the aggregate amounts available for all States under this part for that fiscal year.

(3) None of the funds allocated under this section may be used by the Secretary of the Interior for administrative purposes, including child count, and the provision of technical assistance.

(b) *Distribution of funds.* The Secretary of the Interior shall distribute the total amount of the .25 percent under paragraph (a) of this section in accordance with section 611(f)(4) of the Act.

(Authority: 20 U.S.C. § 1411(f))

§ 300.711 Entitlements to jurisdictions.

(a) The jurisdictions to which this section applies are Guam, American Samoa, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia, the Republic of the Marshall Islands, and Palau, (until the Compact of Free Association with Palau takes effect pursuant to section 101(a) of Pub. L. 99-658).

(b) Each jurisdiction under paragraph (a) of this section is entitled to a grant for the purposes set forth in section 601(c) of the Act. The amount to which those jurisdictions are so entitled for any fiscal year shall not exceed an amount equal to 1 percent of the aggregate of the amounts available to all States under this part for that fiscal year. Funds appropriated for those jurisdictions shall be allocated proportionately among them on the basis of the number of children aged 3 through 21 in each jurisdiction. However, no jurisdiction shall receive less than $150,000, and other allocations shall be ratably reduced if necessary to ensure that each jurisdiction receives at least that amount.

(c) The amount expended for administration by each jurisdiction under this section shall not exceed 5 percent of the amount allotted to the jurisdiction for any fiscal year, or $35,000, whichever is greater.

(Authority: 20 U.S.C. § 1411(e))

Reports

§ 300.750 Annual report of children served—report requirement.

(a) The SEA shall report to the Secretary no later than February 1 of each year the number of children with disabilities aged 3 through 21 residing in the State who are receiving special education and related services.

(Authority: 20 U.S.C. § 1411(a)(3))

(b) The SEA shall submit the report on forms provided by the Secretary.

Approved by the Office of Management and Budget under control number 1820-0043.

(Authority: 20 U.S.C. § 1411(a)(3))

Note: It is very important to understand that this report and the requirements that relate to it are solely for allocation purposes.

The population of children the State may count for allocation purposes may differ from the population of children to whom the State must make FAPE available. For example, while section 611(a)(5) of the Act limits the number of children who may be counted for allocation purposes to 12 percent of the general school population aged 3 through 17 (in States that serve all children with disabilities aged 3 through 5) or 5 through 17 (in States that do not serve all children with disabilities aged 3 through 5), a State might find that 14 percent (or some other percentage) of its children have disabilities. In that case, the State must make FAPE available to all of those children with disabilities.

§ 300.751 Annual report of children served—information required in the report.

(a) In its report, the SEA shall include a table that shows—

(1) The number of children with disabilities receiving special education and related services on December 1 of that school year;

(2) The number of children with disabilities aged 3 through 5 who are receiving FAPE;

(3) The number of those children with disabilities aged 6 through 21 within each disability category, as defined in the definition of "children with disabilities" in § 300.7; and

(4) The number of those children with disabilities aged 3 through 21 for each year of age (3, 4, 5, etc.).

(b) For the purpose of this part, a child's age is the child's actual age on the date of the child count: December 1.

(c) The SEA may not report a child aged 6 through 21 under more than one disability category.

(d) If a child with a disability aged 6 through 21 has more than one disability, the SEA shall report that child in accordance with the following procedure:

(1) A child with deaf-blindness must be reported under the category "deaf-blindness."

(2) A child who has more than one disability (other than deaf-blindness) must be reported under the category "multiple disabilities."

Approved by the Office of Management and Budget under control number 1820-0043.

(Authority: 20 U.S.C. §§ 1411(a)(3); (5)(A)(ii); 1418(b))

§ 300.752 Annual report of children served—certification.

The SEA shall include in its report a certification signed by an authorized official of the agency that the information provided is an accurate and unduplicated count of children with disabilities receiving special education and related services on the dates in question.

(Authority: 20 U.S.C. §§ 1411(a)(3); 1417(b))

§ 300.753 Annual report of children served—criteria for counting children.

(a) The SEA may include in its report children with disabilities who are enrolled in a school or program that is operated or supported by a public agency, and that either—

(1) Provides them with both special education and related services; or

(2) Provides them only with special education if they do not need related services to assist them in benefitting from that special education.

(b) The SEA may not include children with disabilities in its report who—

(1) Are not enrolled in a school or program operated or supported by a public agency;

(2) Are not provided special education that meets State standards;

(3) Are not provided with a related service that they need to assist them in benefitting from special education;

(4) Are counted by a State agency under subpart 2 of part D of chapter 1 of Title I of the Elementary and Secondary Education Act of 1965; or

(5) Are receiving special education funded solely by the Federal Government. However, the State may count children covered under § 300.186(b).

(Authority: 20 U.S.C. §§ 1411(a)(3); 1417(b))

Note 1: Under paragraph (a) of this section, the State may count children with disabilities in a Head Start or other preschool program operated or supported by a public agency if those children are provided special education that meets State standards.

Note 2: Special education, by statutory definition, must be at no cost to parents. As of September 1, 1978, under the FAPE requirement, both special education and related services must be at no cost to parents.

There may be some situations, however, where a child receives special education from a public source at no cost, but whose parents pay for the basic or regular education. This child may be counted. The Department expects that there would only be limited situations where special education would be clearly separate from regular education—generally, where speech services is the only special education required by the child. For example, the child's parents may have enrolled the child in a regular program in a private school, but the child might be receiving speech services in a program funded by the LEA. Allowing these children to be counted will provide incentives (in addition to complying with the legal requirement in section 613(a)(4)(A) of the Act regarding private schools) to public agencies to provide services to children enrolled by their parents in private schools, since funds are generated in part on the basis of the number of children provided special education and related services. Agencies should understand, however, that if a public agency places or refers a child with a disability to a public or private school for educational purposes, special education includes the entire education program provided to the child. In that case, parents may not be charged for any part of the child's education.

A State may not count Indian children on or near reservations and children on military facilities if it provides them no special education. If an SEA or LEA is responsible for serving these children, and does provide them special education and related services, they may be counted.

§ 300.754 Annual report of children served—other responsibilities of the State educational agency.

In addition to meeting the other requirements of §§ 300.750-300.753, the SEA shall:

(a) Establish procedures to be used by LEAs and other educational institutions in counting the number of children with disabilities receiving special education and related services;

(b) Set dates by which those agencies and institutions must report to the SEA to ensure that the State complies with § 300.750(a);

(c) Obtain certification from each agency and institution that an unduplicated and accurate count has been made;

(d) Aggregate the data from the count obtained from each agency and institution, and prepare the reports required under §§ 300.750-300.753; and

(e) Ensure that documentation is maintained that enables the State and the Secretary to audit the accuracy of the count.

Approved by the Office of Management and Budget under control number 1820-0043.

(Authority: 20 U.S.C. §§ 1411(a)(3); 1417(b))

Note: States should note that the data required in the annual report of children served are not to be transmitted to the Secretary in personally identifiable form. States are encouraged to collect these data in non-personally identifiable form.

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